

The Montreux Document on Private Military and Security Companies

**Report of the Ethiopia Regional Conference
on Private Military and Security Companies**



The Montreux Document:

Report of the Ethiopia Regional Conference on Private Military and Security Companies



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INSTITUTE FOR PEACE AND SECURITY STUDIES
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On 11–12 November 2015, the Swiss Federal Department of Foreign Affairs (FDFA), the International Committee of the Red Cross (ICRC), the Institute for Peace and Security Studies (IPSS – Addis Ababa University) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) organised a Regional Conference on private military and security companies (PMSCs) in Addis Ababa, Ethiopia. The event included the participation of over 80 representatives of governments, international organisations, civil society and industry from 16 states in the region: Botswana, Eritrea, Ethiopia, Ghana, Kenya, Malawi, Rwanda, Senegal, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe. This report details the proceedings of the conference and was prepared by DCAF, at the request of the Swiss FDFA.

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The Institute for Peace and Security Studies (IPSS) of Addis Ababa University is a premier higher learning and research institution on peace and security studies. IPSS and the Africa Peace and Security Programme (APSP) pursue the mission to promote peace and security in Ethiopia and Africa at large through education and professional development and research and policy dialogues. The APSP is a joint programme of the African Union (AU) and Institute for Peace and Security Studies of Addis Ababa University, mandated by the African Union’s executive Council to take up the intellectual challenge of finding African-led solutions to peace and security in Africa. Visit us at www.ipss-addis.org

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Foreword

The issues surrounding private military and security companies (PMSCs) in Africa do not have the same level of policy focus and regulatory oversight as mainstream peace and security issues. However, PMSCs play significant roles in security sectors across the continent and have substantial potential to impact the security of the state and its citizens. PMSCs are active on national, regional and transnational levels and are frequently inadequately regulated, operating under the radar screen of public state actors, regional organisations, and transnational frameworks.

In order to bring greater focus to these issues, the Swiss Federal Department of Foreign Affairs, the International Committee of the Red Cross, the Institute for Peace and Security Studies of Addis Ababa University (IPSS) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) partnered to co-host the Regional Conference on Private Military and Security Companies. The Regional Conference facilitated dialogue and debate among states with respect to regulation and oversight of the PMSC industry, identifying good practices and opportunities for cooperation at the national, regional and international levels. The Regional Conference also raised awareness on the relevance of international frameworks on PMSCs for African states, including the Montreux Document, the United Nations' international Draft Convention on PMSCs, and the International Code of Conduct for Private Security Providers.

The 2015 Ethiopia Regional Conference was the second major Montreux Document outreach event on the continent, following the 2014 Conference held in Dakar, Senegal. Together, the events gathered over 100 participants from 32 states and international and regional organizations, offering a clear recognition of the growing significance of the issue of private security governance. Importantly, the African Union (AU), the Economic Community of West Africa States (ECOWAS), and the Intergovernmental Authority on Development (IGAD) were actively represented in the Regional Conference. The events in Dakar and Addis Ababa also demonstrated a growing awareness amongst representatives of states, and regional and continental organisations on the need for action on this issue. Steps have begun to be taken towards more knowledge and understanding of private security companies, as well as more effective oversight of the industry, for instance through the AU Policy Framework on Security Sector Reform (2013) and the ECOWAS Policy Framework for

Security Sector Reform and Governance (2016). However, up-to-date and relevant research on the industry as well as practical implementation of good practices remains a challenge for African states.

With complementary mandates, the IPSS and DCAF can contribute to supporting better governance of the private security industry in the region. As a premier research institution in the region, the IPSS' role extends beyond that of an academic institution. The Institute is a leader in efforts to unpack, debate and clarify issues that are often misunderstood or under-researched but are of paramount societal importance and potential impact, to the appropriate policy and regulatory platforms. With 63 member states on its Foundation Council, including 9 from Africa, DCAF is an international foundation working to support effective, efficient security sectors which are accountable to the state and its citizens. DCAF's programme of supporting private security governance and its role as the implementing partner of the Montreux Document initiative are key priorities for the Centre. In addition to their strategic partnership officially enshrined in June 2015, DCAF and the IPSS are examining follow-up opportunities and developing cooperation with Regional Economic Communities and the AU to support democratic security sector governance and strengthen capacities of African states in regulating their relationships with private security companies.

Through these ongoing and durable partnerships, DCAF and the IPSS seek to promote the respect of human rights and advancement of sustainable security sectors. This report of the Ethiopia Regional Conference proceedings is an important step in the follow up to the Regional Conference and it is hoped that constructive dialogue can be reignited with the recommendations and conclusions gathered herein.



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I. Introduction

On 11–12 November 2015, the Swiss Federal Department of Foreign Affairs (FDFA), the International Committee of the Red Cross (ICRC), the Institute for Peace and Security Studies at Addis Ababa University (IPSS), and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) organised a Regional Conference on private military and security companies (PMSCs) in Addis Ababa, Ethiopia. The Conference aimed to initiate a dialogue on the challenges and good practices of regulating PMSCs in the region and on the guidance provided by the *Montreux Document on pertinent international legal obligations and good practices for states related to operations of PMSCs during armed conflict* (Montreux Document).

With over 80 participants in total, the event gathered 16 states from the African region¹ as well as academics, civil society, and representatives of industry. The Conference was also attended by high level representatives of the African Union (AU) and Regional Economic Communities (RECs) including: the AU Commission for Peace and Security, the AU Commission for Political Affairs, the Intergovernmental Authority on Development (IGAD), and the Commission of the Economic Community of West African States (ECOWAS) as well as the United Nations Office to the AU (UNAU). The event was the second Regional Conference on the African continent; in 2014, a Regional Conference for Francophone and Lusophone states was held in Dakar, Senegal.

The issue of PMSCs is pertinent in the region and participants of the Conference discussed that PMSCs have increased their presence on the African continent. As a growing phenomenon, PMSCs are increasingly contracted both by African states as well as international missions (eg. United Nations) and private clients (eg. mining companies) to provide a diversity of security and military-related services. This has led to valid concerns over ensuring the respect for human rights and international humanitarian law (IHL).

Participants of the Regional Conference also expressed that it is essential to promote initiatives such as the Montreux Document, which seeks to promote respect of international law and advance effective implementation of national regulation.

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¹ Botswana, Eritrea, Ethiopia, Ghana, Kenya, Malawi, Rwanda, Senegal, Sierra Leone, South Africa, South Sudan, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe.

Currently, 54 states and three international organisations (IOs) have lent their support to the Montreux Document.² Among these, only 5 states are from Africa (Angola, Madagascar, Sierra Leone, South Africa, and Uganda), raising questions about the limited African participation in the initiative. Could this be due to a lack of research and information on the activities of PMSCs in the region? Do states in the region need more targeted bilateral and regional outreach on existing instruments and initiatives – including the Montreux Document – that seek to regulate the industry? How can African states and regional organisations more effectively address the activities of PMSCs? These questions were discussed extensively by participants of the Regional Conference, who identified both challenges and opportunities for implementation and outreach of the Montreux Document on national, regional, and multilateral levels in Africa.

This report seeks to present a summary of proceedings and an analysis of debates, questions, conclusions and recommendations raised during the presentations and discussions held over the two days of the Regional Conference. The content of the report is primarily based on panel presentations and interventions made during discussion sessions, but in accordance with Chatham House rules, specific participant contributions are not attributed. Where relevant, the report is supplemented by other academic sources.

The remainder of the report is divided into the following sections:

■ *Background, Concepts and Definitions: PMSCs, the Montreux Document, and other International Initiatives*

This section will discuss the terminology used throughout the Conference and will also provide background on the development and adoption of the Montreux Document and Montreux Document Forum (MDF), as well as information related to the UN Draft Convention on PMSCs and other international regulatory frameworks pertaining to PMSCs.

■ *Private Military and Security Companies in Africa*

The report will give an overview of the growth, characteristics, main clients and services offered by the PMSC industry in Africa. This section will also include reflections on the regional realities and particular contexts of the contracting of PMSC services, particularly the use of PMSCs in crime prevention and policing partnerships, extractive industries, and humanitarian operations.

■ *Regulating PMSCs: The Montreux Document as a Roadmap*

The report will subsequently outline the specific regulatory challenges raised by states and regional organisations with respect to national implementation of effective regulations.

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² For an up-to-date list of participants, visit www.mdforum.ch/participants

■ *Conference Reflections on the Ways Forward*

The final section will discuss proposals, reflections, and opportunities identified by participants related to the areas of follow-up and further outreach. Although the Regional Conference did not adopt formal conclusions, a number of participants proposed concrete ways forward on how states can address and overcome challenges with good practices. This section can provide a reference point for future activities in the region with regards to PMSC regulation.

Background, Concepts and Definitions: PMSCs, the Montreux Document, and other International Initiatives

1. Concepts and Definitions

Defining PMSCs:

There is no universally accepted, standard definition of a “military company” or a “security company.” In ordinary language, certain activities (such as participating in combat) are traditionally understood to be military in nature, and others (such as guarding residences) are typically related to security. The Montreux Document has taken an inclusive approach to the definition and identifies PMSCs as

private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.³

Companies are therefore not easily categorized; the same company can provide a wide variety of services, some which are typically military services and others are typically security services. Moreover, from a humanitarian point of view, the relevant question is not how a company is labeled but what specific services it provides. For this reason, this Conference report draws on the Montreux Document’s definition of PMSCs to encompass all companies that provide either military or security services or both.

Distinguishing PMSCs from mercenaries:

A number of African states address mercenaries either through ratifying the UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989) or through the OAU Convention for the Elimination of Mercenarism in Africa (1985). However, the distinction between PMSCs and mercenaries is important as it affects the scope and application of national regulations. Mercenaries are defined in international humanitarian law⁴ and are

³ Montreux Document, paragraph 9, preface.

⁴ Article 47 of Protocol I additional to the 1949 Geneva Conventions, applicable in international armed conflicts, describes a mercenary as someone who : (1) is especially recruited in order to fight in an

determined on a case by case basis depending on the circumstances and the nature of the functions they carry out. In most cases, the definition of mercenaries excludes most personnel of PMSCs as it requires that all conditions of Article 47 of Protocol I additional to the 1949 Geneva Conventions are met. However, in some cases, PMSC personnel would meet the conditions to be defined as mercenaries and in this case, they are not entitled to the combatants or prisoner of war status under IHL applicable to international armed conflict. Therefore the distinction between PMSCs and mercenaries is important as it affects the scope and application of international law and national regulations.

2. Background to the Montreux Document

Before the Montreux Document was launched, there was no international document or instrument that specifically addressed the activities of PMSCs. Additionally; many believed that the rapidly growing PMSC industry operated in a legal vacuum, raising questions as to whether they could be held accountable for violations of international humanitarian law and human rights. In response to this, Switzerland and the ICRC initiated the Montreux Document process in 2006. Finalised and adopted in 2008 through intergovernmental discussions, the Montreux Document is the first initiative of international significance to reaffirm the existing obligations of states under international law, in particular IHL and human rights law, relating to the activities of PMSCs.

First, the Montreux Document recalls the pertinent legal obligations of states regarding PMSCs. These obligations are primarily drawn from existing international humanitarian and human rights agreements and customary international law. The second section contains a set of Good Practices, which aim to provide guidance and assistance to states in regulating PMSCs. The Good Practices include specifying which services may or may not be contracted out to PMSCs, requiring appropriate training, establishing terms for granting licenses, and adopting measures to improve supervision, transparency and accountability of PMSCs. The Montreux Document’s Good Practices therefore offer a practical blueprint for how states can effectively regulate PMSCs.

Since the Montreux Document was adopted in 2008, the focus of the initiative has been on building support in the different world regions and on supporting implementation at the national level.⁵ The 2015 Regional Conference in Addis

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armed conflict ; (2) in fact takes a direct part in hostilities; (3) is motivated essentially by the desire of private gain; (4) is neither a national of a party to the conflict nor a resident of territory controlled by a party the conflict; (5) is not a member of the armed forces of a party to the conflict; (6) has not been sent by a state which is not a party to the armed conflict on official duty as a member of its armed forces.

⁵ To ensure respect for IHL and international human rights law, it is essential that states enact laws that clearly regulate PMSCs, including those companies operating domestically as well as across

Ababa was part of a multiyear programme of outreach events aimed at encouraging dialogue on issues related to the regulation of PMSCs. In addition to this most recent workshop, regional conferences have also been held in Chile for Latin America and the Caribbean (2011), Mongolia for North East and Central Asia (2011), Australia for the Pacific region (2012), Philippines for Southeast Asia (2013), and in Senegal for Francophone and Lusophone African states (2014).

Scope and application:

The Montreux Document highlights the responsibilities of three principal types of states: Contracting states (countries that hire PMSCs), Territorial states (countries on whose territory PMSCs operate), and Home states (countries in which PMSCs are headquartered or based). While these three types of states are the main target groups, the document also contains sections of relevance to all states and international organisations, to PMSCs and to their personnel. While the Document is addressed primarily to governments, the Good Practices may be useful for other actors such as international organisations, civil society, companies that contract PSMCs, and PMSCs and their personnel themselves.

In line with IHL, the Montreux Document primarily addresses PMSCs that operate in an armed conflict environment. Nevertheless, the Montreux Document is also meant to provide practical guidance for other contexts, including a number of Good Practices that are appropriate to put into place during peacetime. The use of PMSCs in guarding extractive industries or for the protection of merchant ships against acts of piracy are examples of how the Montreux Document can be instructive and apply to situations outside of armed conflict. The Document provides a practical tool for states in the process of elaborating or improving national legal frameworks that address the domestic and/or international activities of PMSCs.

The Montreux Document seeks to provide guidance on the basis of existing international law; it is therefore not a legally binding treaty and does not create new legal obligations. However, the majority of the rules and Good Practices of the Montreux Document are drawn from IHL and human rights law. In most cases, regardless of their support for the Document, states are already bound by the international legal obligations contained in the Montreux Document by virtue of their ratification of the Geneva Conventions and other international treaties. The

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international borders. The Montreux Document recommends that national legislation addresses a variety of challenges related to PMSCs. For instance, it is essential that states enact laws that clearly determine which services may or may not be performed by PMSCs. Laws should also delineate among risk management, training and advisory functions and those activities that may lead PMSCs to become involved in direct participation in hostilities. Additionally, ensuring that existing licensing and authorisation systems are able to effectively perform their tasks is another way for states to ensure respect for the Montreux Document. For more details, see www.mdforum.ch/implementation.

Montreux Document enhances the protection afforded to victims of armed conflicts by clarifying and reaffirming applicable international law, and by encouraging the adoption of national regulations to strengthen respect for international law.

The Montreux Document Forum: A new platform for dialogue:

In December 2013, Switzerland and the ICRC in cooperation with DCAF hosted the Montreux +5 Conference to reflect on the fifth anniversary of the finalisation of the Montreux Document. During this Conference, participants supported the idea of establishing a Forum to engage in more regular dialogue on the implementation of the rules and Good Practices contained in the Document and on outreach. Following a number of preparatory meetings with Montreux Document participants, the Montreux Document Forum (MDF) was established in December 2014 as a platform for informal consultation among participants. The MDF seeks to support the national implementation of the Montreux Document as well as to bring in more states to actively support it.

The MDF is a dynamic and evolving community where states are able to discuss relevant issues and common challenges to the regulation of PMSCs, as well as innovative good practices in implementing more effective regulation of PMSCs.

3. Other International Initiatives

The International Code of Conduct for Private Security Service Providers:

Following the launch of the Montreux Document, there was a strong conviction shared by stakeholders in the issue that companies should also be directly included in efforts to regulate the PMSC industry. This led to the joint development of the International Code of Conduct for Private Security Service Providers (ICoC) by industry, states, human rights organisations, as well as academics and clients of private security companies. Finalised in 2010, the ICoC has complementary objectives to the Montreux Document as it integrates principles based on IHL and human rights and also includes practical measures that should be taken by private security companies within the context of their operations. In 2013, the ICoC was complemented by the establishment of an independent oversight mechanism (the ICoC Association/ ICoCA) to ensure effective implementation of and compliance with the Code by member private security companies (PSCs).

The ICoC has a clearly defined scope of application which differs slightly from that of the Montreux Document. It applies to PSCs that are involved in providing security services in complex environments. This specific definition does not include the “military” aspect of some services. Security services are defined as “guarding or protecting persons, facilities or objects, or any other activities that require them

to carry or operate a weapon,”⁶ and personnel are not to use “firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life,”⁷ which severely limits direct participation in hostilities. The term “complex environments” not only includes armed conflict but also post-conflict situations and other circumstances “where the rule of law has been substantially undermined and in which the capacity of the state authority to handle the situation is diminished, limited or non-existent.”⁸

The Montreux Document and the ICoC are mutually reinforcing instruments as the ICoC integrates a number of Montreux Document Good Practices. Many states already use the ICoC in order to regulate PSCs effectively and in accordance with internationally recognised good practices. For instance, a number of states have required the PSCs with which they contract to be members in good standing in the ICoCA. The ICoC and the ICoCA constitute a mechanism that builds on and complements the Montreux Document with the shared principal objective of enhancing compliance with applicable rules of IHL and international human rights law.⁹

Draft Convention on PMSCs:

In 2005, the UN Human Rights Council created the Working Group on the use of mercenaries.¹⁰ Its mandate was to study and identify issues regarding mercenary and mercenary-related activities as well as the effects of the activities of PMSCs and challenges to regulation. The Working Group was also mandated to prepare a draft of international basic principles to encourage respect for human rights by PMSCs. In 2010, the first draft of this international binding instrument (Draft Convention) was proposed and the UN Human Rights Council voted to establish an open ended intergovernmental working group (OEIGWG)¹¹ to take forward the process of the Draft Convention and intergovernmental deliberations. Since then, the OEIGWG has been debating with delegations and working towards building a consensus on the draft.

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⁶ International Code of Conduct for Private Security Service Providers (ICoC), para. 1 and the definitions provided in Chapter B.

⁷ ICoC, Article 31.

⁸ ICoC, Chapter B, definition of “complex environments.”

⁹ For further analysis see Nelleke Van Amstel and Tilman Rodenhäuser, “The Montreux Document and the International Code of Conduct : Understanding the relationship between international initiatives to regulate the global private security industry,” DCAF Public Private Partnerships Series, no. 1 (2016).

¹⁰ The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination.

¹¹ The open-ended intergovernmental working group with the mandate to consider the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies.

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The Montreux Document is complementary to the Draft Convention as the two initiatives share the same objectives: upholding IHL and human rights law and the monitoring and promotion of human rights wherever PMSCs operate. Effective regulation of PMSCs will require well-crafted national legislation informed by international standards which are robustly enforced and supported by multi-stakeholder oversight and governance initiatives. As stated by the Working Group on mercenaries in 2013, the Montreux Document is an important “complementary initiative towards the improvement of standards across the PMSC industry.”¹² The expansion in contracting and use of PMSCs is a relatively new phenomenon whereby clear rules are needed to establish accountability.

The Voluntary Principles on Security and Human Rights:

The Voluntary Principles on Security and Human Rights (VPs) is a multi-stakeholder initiative established in 2000, in which governments, extractive companies and non-governmental organisations (NGOs) work together to address security and human rights challenges arising from extractives operations. The VPs guide extractive companies in maintaining the safety and security of their operations within a framework that ensures respect for IHL, human rights and fundamental freedoms. The principles provide guidance on risk assessments, relations with public security, and relations with private security.

The VPs are particularly relevant for states in the African region in which there are a significant number of extractives companies operating on their territory. According to the UN “Respect, Protect and Remedy” Framework, businesses have a responsibility to respect human rights by acting with due diligence to avoid harming people and addressing any adverse impacts in which they are involved. These responsibilities are outlined in the UN Guiding Principles on Business and Human Rights (UNGPs). Extractives companies often operate in complex environments with little guidance on the ground on how to observe their human rights responsibilities. The VPs help companies identify human rights risks and take meaningful steps to address those risks in a manner that helps ensure respect for human rights in their operations.

As part of their obligations to protect, respect, and fulfil human rights, states have the primary obligation to prevent, investigate and provide effective remedies for victims of human rights abuses, including by enacting and enforcing legislation that requires business to respect human rights, by including human rights clauses when they enter in contracts with business entities, and by creating an enabling environment for business to respect human rights.

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¹² Remarks by Gabor Rona, UN Working Group on the Use of Mercenaries, Montreux +5 Conference, 11–13 December 2013, Montreux, Switzerland, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14105&LangID=E#sthash.CCzVxCmj.dpuf>

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Private Military and Security Companies in Africa

1. Emergence, Characteristics and Challenges of PMSCs in the Region

In his opening keynote speech of the Regional Conference, Dr. Tarek Sharif, Head of the Defence and Security Division at the African Union Commission, commented that the transfer of certain public security functions previously under the responsibility of states to private companies has significantly increased, especially in complex security environments on the African continent. With an estimated global value between USD 100–165 billion and a workforce of 19.5–25.5 million people,¹³ the PMSC industry has also significantly touched the African region and grown rapidly in the 2000s. While panellists at the Regional Conference emphasized the diversity of the region making it difficult to identify universal trends across Africa, a number of factors were identified as contributing to the increased use of PMSCs:¹⁴

- Downsizing of national militaries and the subsequent over-supply of demobilised military personnel;
- High levels of unemployment and the opportunities offered by PMSCs;
- Growing presence of transnational corporations;
- Situations of crisis and instability and concerns over the safety of citizens, business, as well as personnel in humanitarian aid and development; and
- General economic trends towards privatisation.¹⁵

Additionally, many participants noted the challenge that states may face in providing and maintaining security for citizens and businesses in a climate marked by unconventional security threats such as terrorism, maritime piracy, natural disasters, and drug trafficking. There is currently a modern market for internationally-owned

¹³ Small Arms Survey, 2011.

¹⁴ Presentation of Solomon Hassen, "Perspectives and experiences of Ethiopian PMSCs: challenges and opportunities for regulation," Institute for Peace and Security Studies, Addis Ababa University (IPSS), 11 November 2015; Presentation of Tessa Diphooorn, "The Diversity of the Private Security Industry in Sub-Saharan Africa," University of Amsterdam, Netherlands, 11 November 2015.

¹⁵ For further reading, see also Baker, *Multi-choice Policing in Africa*; Rita Abrahamsen and Michael C. Williams, "Securing the City: private security companies and non-state actors in global governance," *International Relations* 21 (2007): 237–253; Sabelo Gumedze. *The private security sector in Africa. The 21st century' major cause for concern?* ISS Paper 133 (2007).

PMSCs as well as domestic companies and these businesses often employ more security personnel than local police forces.

Private security companies operating on a domestic level:

In the domestic markets of the region, the private security industry has a significant number of small and medium domestically-owned private security companies. These companies offer a diversity of services but focus mostly on guarding of residences, business, and transactions (for example homes, embassies, banks, cash transfers). It is difficult to estimate the size of the sector and it varies greatly from state to state. In Addis Ababa, private security companies employ approximately 2’800-9’000 people.¹⁶ Kenya’s industry also expanded significantly following the Westgate Mall terror attacks; today, there are about 2000 companies which hire approximately 400’000 officers.¹⁷ South Africa has the largest private security industry on the continent (8144 companies), valued at approximately two per cent of the country’s total GDP.¹⁸

International PMSCs operating in Africa:

In addition to small and medium local enterprises, conference participants raised that there are a number of large transnational PMSCs and their subsidiaries providing services such as risk management and consulting, guarding extractive mining zones, training support for national militaries and police, and providing security to development or humanitarian agencies.¹⁹ Actors working in international development or peacekeeping/peacebuilding also sometimes contract with PMSCs for various logistical support services.²⁰

Clients and services:

As discussed briefly above, the principal clients of private security companies and PMSCs are states, international organisations such as the UN, large multinational

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¹⁶ Presentation of Solomon Hassen, IPSS, 11 November 2015.

¹⁷ Presentation of Tessa Diphoorn, University of Amsterdam, 11 November 2015.

¹⁸ Discussion by Sabelo Gumedze, 11 November 2015, See also Annual Report 2013–2014, Private Security Industry Regulatory Authority (PSIRA), accessed online May 28th 2015, www.psir.co.za. For further reading, see also Jaap de Waard, “The Private Security Industry in International Perspective,” *European Journal on Criminal Policy and Research* 7 (1999): 143–174.

¹⁹ As one background example, G4S operates in at least 26 African countries, including Nigeria where it has established a local subsidiary, Outsourcing Services of Lagos (OSL). Employing over 3’000 people, OSL was contracted by Chevron Nigeria Ltd. to guard its headquarters and logistical bases, as well as to provide marine security through daily offshore patrols and in areas with drilling rigs and barges. Rita Abrahamsen and Michael C. Williams, “The Globalisation of Private Security: Country Report: Nigeria, 2005, 5, 14.

²⁰ Presentation by Tessa Diphoorn, 11 November 2015. Another background example is Liberia, where Pacific Architects and Engineers (PAE) provided aviation support to ECOMOG, the ECOWAS Monitoring Group involved in peace support operations. For further reading see A. Adebajo, *Building Peace in West Africa: Liberia, Sierra Leone, and Guinea Bissau*, Boulder: Lynne Rienner Publishers, 2002, 90.

companies (oil, gas, mining), as well as NGOs, humanitarian organisations, banks, embassies and other smaller businesses. Services may range from functions more closely associated with “security” to activities that support or complement the military, such as in weapons system maintenance. Participants of the Regional Conference noted that NGOs, international organisations, embassies and other transnational firms are often coveted institutions for PSCs to work for, due to the high salaries and prestigious profile.

Personnel and labour conditions:

Several participants discussed that there are significant labour issues plaguing the PMSC industry in the region. In Malawi, difficult work conditions for private security personnel have lowered standards across the industry and have actually increased the tendency of staff to become involved in criminal activities to supplement incomes.²¹ Ethiopia’s high unemployment has resulted in a ready supply of labour in the market, particularly ex-militia or former military servicemen. As a result of this oversupply of personnel, smaller companies do not have an incentive to pay sufficient salaries.²² The absence of a strong regulatory framework has also led to the rise of ‘informal companies’ which further contribute to poor salaries and dangerous working conditions.²³ Poor wages and working conditions in Kenya make retention of a qualified and committed guard force difficult. Sufficient remuneration for the employees is a key condition for a more efficient, committed and reliable PMSC force yet the highly competitive nature of the sector, large pool of labour, and weak regulatory standards put downward pressure on salaries.

2. PMSCs in Crime Prevention and Policing Partnerships

Participants of the Regional Conference discussed that across many states in Africa, national police forces are constrained in terms of their financial and human resources. Private contractors are providing an increasing number of police-related services to fill these security gaps, which helps to explain the rapid expansion of PMSCs in the region. As a result, there are discussions in a number of African states considering whether public-private partnerships between state and private security actors would improve effectiveness in efforts against crime. In South Africa there are discussions on the development of a policy framework for a crime prevention partnership between the state and the private security sector, and some actors see an official relationship between public and private security as effective in helping to

²¹ Presentation by Dan Kuwali, LL.D, Chairperson, Malawi National Committee on International Humanitarian Law, 11 November 2015.
²² Presentation of Solomon Hassen, IPSS, 11 November 2015; See also Solomon Hassen, Chapter III “The Status of Private Security Companies in Ethiopia: The Case of Addis Ababa,” *An Anthology of Peace and Security Research*, IPSS, in collaboration with Friedrich Ebert Stiftung, 2010.
²³ Presentation of Tessa Diphooorn, University of Amsterdam, 11 November 2015.

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safeguard local communities.²⁴ This approach was first raised in South Africa in the mid-1990s²⁵ and it was proposed that the government would work alongside other partners, such as community members, businesses, and the private security industry to prevent and combat crime. It was recognised that other actors and bodies in the community can contribute to policing and that the new “partnership policing” strategy would regulate how the state police would work with such other actors who could play supportive and collaborative roles, for example through providing/sharing information and resources.²⁶ The industry has generally welcomed the idea of establishing a more formalised partnership with the state and is awaiting a response from the government on the collaboration.²⁷

Similarly, in Botswana, police collaborate with private security companies, for instance in cases where the private security companies are contracted to replenish automated banking machines with cash. A special branch of the national police usually works with the companies in this activity. The private security industry in Botswana is eager to have their relationship with the national police institutionalised including in the form of joint patrols and regular forums. The reasons for such a formalised relationship are also pragmatic as private security may be able to share information to assist police departments. Meanwhile, industry associations in Botswana have been willing to share vehicles and other equipment with police in the fight against crime.²⁸

3. PMSCs in Extractive Industries

Across the region, emerging oil, gas, and mining industries face increased reliance on PMSCs to provide security from theft, vandalism, terrorism, and other crime in complex environments. In addition, transnational corporations might turn to private security to avoid using public forces in countries where the police or army are overstretched in their capacity, may be unreliable, or have a record of human rights violations.²⁹ Furthermore, extractive industry companies may also turn to private security to protect assets and personnel from strikes or other movements.³⁰ The proliferation of commercial resource extraction in Africa has created growing public

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²⁴ Presentation by Margaret Gichanga, South Africa Private Security Industry Regulatory Authority, 12 November 2015.

²⁵ Ibid; See also National Crime Prevention Strategy (NCPS) of 1996 and the 1998 White Paper on Safety and Security.

²⁶ Presentation by Tessa Diphoorn, 11 November 2015; See also Tessa Diphoorn and Julie Berg, “Typologies of partnership policing: case studies from urban South Africa,” *Policing and Society* 24 (2014): 425–442.

²⁷ Presentation by Tessa Diphoorn, 11 November 2015.

²⁸ Discussion by Margaret Gichanga, South Africa Private Security Industry Regulatory Authority, 12 November 2015; See also Sabelo Gumedze, ed. *Promoting Partnerships for Crime Prevention between State and Private Security Providers in Southern Africa* (PSIRA:2015), 77.

²⁹ See Small Arms Survey, “Protected but Exposed: Multinationals and Private Security,” 2011.

³⁰ Presentation by Joseph Kibugu, Business and Human Rights Resource Centre, 12 November 2015.

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expectations of significant local and national benefits including increased revenue, employment creation, social investment and overall economic development. However, in many instances, local communities have not benefited from these resources sufficiently or at all and this frustration is manifested in protests and strikes. In these complex environments, the lines between public and private security can be blurred, for example through the recruitment of private security personnel from public forces with poor human rights records. In other cases, extractive industries use hybrid arrangements of public and private security (i.e. moonlighting or secondment). This creates further security challenges when active duty personnel are involved, including the misuse of force and firearms and corruption.

A number of participants of the Regional Conference noted that these trends are common across the region. In Kenya, mining is a well-established sector but there has been a renewed focus on upstream oil and gas development with the entrance into the sector of new companies. Of 25 companies active in Kenya, all but one are international³¹ and these companies frequently use both domestic private security companies and international PMSCs, which are overwhelmingly staffed by locals. In Nigeria, the most sought after private security contracts are with oil companies and the various contractors and service companies associated with the oil industry. The private security market in Nigeria is undergoing an increasing expansion of services with several leading companies incorporating the use of more technology and equipment such as satellite tracking, radio alarms, panic buttons and armoured vehicles.³²

4. PMSCs in Humanitarian Operations

As a result of armed conflict, concerns over terrorism, refugee crises, and natural disasters, humanitarian organisations are very active in the region and some have relied on PMSCs. A number of participants of the Regional Conference expressed that since these organisations are often operating in areas of armed conflict or other complex environments, there is potential for PMSCs to exacerbate problems or cause negative impacts. For example, in South Sudan, the protection of humanitarian and NGO staff has been a key concern driving the PMSC market.³³ PMSCs focus primarily on guarding, logistical support, evacuation and emergency response, installation of security surveillance, alarm systems, and perimeters. However, PMSCs have also performed other supportive functions in South Sudan; in 2006, Armor Group/G4S

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³¹ Presentation by Rose Kimotho, Institute for Human Rights and Business, 12 November, 2015.
³² For further reading, see also Rita Abrahamsen and Michael C. Williams, "The Globalisation of Private Security: Country Report: Nigeria, 2005, 5, 14
³³ Presentation by Tessa Diphooorn, 11 November, 2015.

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was contracted by the UN to map and clear mine fields.³⁴ A number of participants in the Regional Conference noted that the lack of transparency, democratic oversight and accountability, have led to a decreased perception of legitimacy of PMSCs, who are seen as showing disdain for human rights, operating outside the framework of the rule of law, and without accountability to the state. In many instances, PMSCs are seen as profiting from conflict or instability.³⁵

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³⁴ Ibid; For further reading see also Michon Motzouris, *Conference Report on the Involvement of the Private Security Sector in Humanitarian Assistance Operations in Africa* (Pretoria: Institute for Security Studies, 2011), 14-15. See also Østensen, *UN Use of Private Military and Security Companies*, 35. See also William Langewiesche, "The Chaos Company," *Vanity Fair*, April 2014, accessed 6 April 2016: <http://www.vanityfair.com/news/business/2014/04/g4s-global-security-company>.

³⁵ For further reading see also Rachel Zedeck, Private military/security companies, human security and state building in Africa, *African Security Review* 16 (4), 99.

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IV.

Regulating PMSCs: The Montreux Document as a Roadmap

Participants of the Regional Conference recognised that across the region, existing national regulatory frameworks experience challenges in regulating, monitoring and overseeing PMSCs, especially as these businesses are expanding in scope and complexity of services. Furthermore, some representatives noted that the discourse on anti-mercenary laws does not adequately consider the PMSC phenomenon. Participants agreed however that national laws remain central to any effective regulatory regime.³⁶ For African states which have gained independence relatively recently, sovereignty and the monopoly over the use of force as well as the privilege to provide security for people are significant state roles. Implementing regulatory frameworks that place PMSCs under national control are expressions of this state sovereignty and fulfilment of government duty. This section will discuss the specific challenges in national legislation that were raised by Conference participants and address how Montreux Document Good Practices can be useful for states to overcome these challenges. The section will then speak to attempts to address PMSCs on regional and continental levels.

1. National Regulatory Measures

During the Regional Conference, participants were divided on the necessity to regulate PMSCs. Some participants felt that regulation would be tantamount to legitimizing PMSC. Notwithstanding this argument, the Conference accepted that PMSC activity on the continent is on the rise and that PMSCs are likely to remain. On this basis, the Montreux Document should not be construed as endorsing the use of PMSCs in any particular instance, as it seeks to assist states in regulating the relationship with PMSCs if the decision has been made to contract private security services. Like all other armed actors present in armed conflicts, PMSCs are governed by international rules, whether or not their presence and activities are legitimate. The same can be said of private security companies operating in complex environments or areas where the rule of law is fragile, as well as in peacetime settings. The Montreux Document was presented as a practical guidance that not only recalls the pertinent international legal obligations for all types of states, but also proposes useful Good Practices to assist governments in implementing national measures to meet their obligations.

³⁶ Presentation by Laurence Juma, Regional Conference on PMSCs, 11 November 2015.

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Applicability of domestic law to transnational PMSCs:

Several participants expressed the challenges of enacting clear and effective national domestic legislation that applies to PMSCs registered in one state but which operate abroad. Nigeria for example, requires that any company providing security services in the country must be wholly owned by Nigerian citizens. This means that international companies often establish local subsidiaries in the country and operate through different agreements with the parent company. It is important that the applicability of legislation is clear and that monitoring is carried out effectively, because in the case of human rights violations, subsidiaries can often be used as convenient shields for the parent companies.

The Montreux Document can be helpful in this respect, as it recommends states to provide for administrative measures over PMSC misconduct as well as criminal and non-criminal jurisdiction in national legislation over crimes committed by PMSCs and their personnel. States should consider establishing corporate criminal responsibility and should address the issue of scope of jurisdiction, immunities and appropriate civil, criminal, and administrative remedies for misconduct in order to ensure accountability of PMSCs and their personnel.³⁷

National regulatory bodies licensing PMSCs:

Most states in the region require private security companies operating in the country to obtain licenses or authorisations. However, a number of participants of the Regional Conference raised the difficulties with designating one central authority responsible for issuing licenses, contracts and authorisations to PMSCs. In most countries, the office responsible for this has multiple related files or has insufficient resources and training to carry out effective procedures of certifying and authorising PMSCs. For instance in the Gambia, PSCs are regulated by the Licensing Authority for Private Security Guard Companies, which is an office in the Ministry of Interior, or by a public officer designated on behalf of the Minister of Interior.³⁸ In the case of Uganda, an application to operate a private security organisation must be submitted to the Inspector General of Police. The responsibility of the Inspector General is to supervise and regulate the activities of private security companies, thereby essentially acting as the regulatory Authority.

Additionally, regulatory authorities in Africa often experience resource constraints. South Africa's Private Security Industry Regulatory Authority (PSRIA) is an example of one of the most extensive and developed regulatory bodies. PSIRA stipulates how the private security industry must operate and determines forms of (judicial) punishment in the event of misconduct. If a service provider is not registered or

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³⁷ Montreux Document Good Practices 19–23, 48–52, and 69–73.

³⁸ S 4 (1) of the Private Security Guard Companies Act No. 5 of 2011.

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does not operate in accordance with PSIRA’s legislation, a charge of misconduct is opened, with the penalties differing according to the case. However, PSIRA experiences resource challenges as it is not funded by the government but instead generates its revenues from fees paid by the private security industry. Participants of the Regional Conference raised the significant challenges in compelling companies to comply with the fee structure. As a result, funding is one of the biggest hindrances with regards to PSIRA becoming a more effective regulator.³⁹

The Montreux Document encourages states to develop effective licensing, contracting and authorisation systems for PMSCs. In order to carry this out effectively, the Montreux Document recommends that states establish/nominate an appropriately independent government organ with adequate human and financial resources.⁴⁰ As these activities are increasingly complex due to the growing number of companies entering the industry and the expanding scope of services, states can streamline complex and parallel bureaucracies into a central agency, implement targeted training programmes for agency managers and ensure that these officers have the power and resources they require to carry out their mandate.

Training of PMSC personnel:

Training of PMSC personnel was discussed as a significant challenge in a number of states in the region. For instance, in Ethiopia, companies that provide guards for embassies and international organisations undergo training of one to three weeks, including some awareness-raising of human rights. In addition to this inconsistency in training standards, adequate training is very rare for companies that are not contracted by the international community or large transnational corporations.⁴¹ Conference participants discussed that the development of national minimum criteria for the selection and training of all private guards is essential. The Montreux Document recommends that personnel should receive training on the use of force and firearms, on IHL and human rights law, on religious, gender and cultural issues, on how to handle complaints by the civilian population and on preventing bribery and corruption.⁴²

Licensing of firearms or weapons:

A number of participants of the Regional Conference expressed that the proliferation of illicit small arms and light weapons (SALW) is a serious issue in situations of armed conflict and post-conflict settings. A number of states prohibit PMSC personnel from carrying firearms. However, these rules are frequently circumvented. In Ethiopia,

³⁹ Presentations by Sabelo Gumedze and Margaret Gichanga, Regional Conference on PMSCs, 11–12 November 2015.

⁴⁰ Montreux Document Good Practice 3, 27, 58 and 4, 29 and 59.

⁴¹ Presentation by Solomon Hassen, Regional Conference on PMSCs, 11 November 2015.

⁴² Montreux Document Good Practices 10, 35, 63.

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several clients of private security services will themselves register weapons and enable the private guards to “rent” the weapons for carrying out protective duties. On this basis, Conference participants discussed that it is necessary to implement national laws that regulate this phenomenon. The Montreux Document’s Good Practices recommend that states require PMSCs to acquire weapons lawfully, as well as that appropriate rules should be in place for the use of force and firearms.⁴³ The Montreux Document also recommends appropriate training in this respect; granting licenses or authorisations to PMSCs that have registered weapons should be conditional on the completion of approved use of force training by qualified staff.

Monitoring compliance with legislation:

In states that experience a lack of practical capacity to ensure full effective implementation of legislation, monitoring and oversight can be negatively impacted. A persistent implementation deficit can result in a lack of effective oversight and governance. Several Conference participants stated that industry associations often perform self-regulatory oversight functions in order to compensate for this deficit. In Nigeria, there are at least five industry associations which seek to promote higher standards for PSCs and these bodies also would like to see the establishment of a private security regulatory authority to promote guidelines and carry out checks on training, wages, and working conditions. Through the development of systematic, institutionalised administrative and monitoring mechanisms, guidance from the Montreux Document can assist states to ensure that the activities of PMSCs are consistent with national law and with IHL and human rights law.⁴⁴ For instance, states can require companies to disclose information to parliamentary committees, oversight bodies or regulatory authorities regarding their activities and services offered, their ownership structures and internal oversight mechanisms.⁴⁵

Transparency of the industry:

Participants of the Regional Conference highlighted that a number of states across the region experience challenges regarding the transparency in the industry. Large domestic private security companies are sometimes owned by individuals within the government or with strong ties to the government. This involvement of influential individuals and political elites has eroded the incentive for scrutiny and oversight of company activities. Montreux Document Good Practices recommend states to consider PMSCs’ ownership structure and to perform background checks on companies in order to ensure transparency of the industry.⁴⁶

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⁴³ Montreux Document Good Practices 11, 18, 36, 43, 44, 64.
⁴⁴ Montreux Document Good Practices 21, 23, 46–48, 52, 68, 69 and 73.
⁴⁵ Montreux Document Good Practice 4, 29 and 59.
⁴⁶ Montreux Document Good Practice 2, 28 and 57.

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Case Study: The Regulation of Private Security in Ethiopia: Current Dialogues, Debates, and Challenges⁴⁷

In Ethiopia, the PMSC industry is currently at an early stage; however, there are already close to one hundred companies in operation. The evolution of the industry in the country can be characterised by three periods; first, the changing of government (early part of the 1990's, initial stage) was marked by a high number of demobilised soldiers and high rates of unemployment due to an unstable socio-political situation. The second phase (since 2005) followed economic growth and high privatisation in the country. This led to the entry of PSCs into the market (expansion stage), which led to an increased demand for security. The third stage of the industry's growth was in 2008-2009, when demand for PSCs intensified due an increase in development and international actors in the country.⁴⁸

In the face of an increasing economic boom and the growing trend of outsourcing of security provision to private actors, the Ethiopian private security sector is fast growing and has become a multi-million birr industry. Some of the big companies have an annual cash flow of 40 to 50 million birr (USD 1.8 million- 2.3 million) each.⁴⁹

The qualification to join the sector as a guard includes completion of eighth grade or above for women and sixth grade or above for men. With regards to the working conditions of the security guards, they are deployed according to a shift system; after 24 hours of service, a guard is off-duty for the following 48 hours. However, guards suffer from a lack of proper logistics such as uniforms, rain-coat, torches, shoes and reflective night uniforms.

License requirements:

There is currently no law in Ethiopia that specifically regulates PMSCs. The issue of "military-related" services is also not addressed in Ethiopian legislation; therefore we refer to the regulation of PSCs in the country. The Ethiopian Trade proclamation No. 020/2/6056/2008 does not specify the guarding and security provision sector as a type of business. However, as per

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⁴⁷ The Regional Conference was co-hosted by the Institute for Peace and Security Studies of Addis Ababa University, whose extensive research on private security companies in Ethiopia is included as a dedicated case study to this volume.

⁴⁸ Solomon Hassen, Chapter III, "The Status of Private Security Companies in Ethiopia: The Case of Addis Ababa," *An Anthology of Peace and Security Research*, IPSS, in collaboration with Friedrich Ebert Stiftung, November 2010.

⁴⁹ Ibid.

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Federal Negarit Gazeta proclamation No. 720/2011 Article 28 “the Federal Police can issue certificates of competence to private institutions wishing to engage in providing security service.” The request to getting a license has to be submitted to the FP Professional Counseling and Arms License Division together with a form prepared to this effect.

Key challenges:

A discussion with stakeholders and experts on the industry has identified the following challenges:

- The absence of a specific regulatory regime;
- Lack of professionalisation and little application of international good practices;
- Little or no training for personnel;
- Non-existent or little working relationship amongst the different PSCs with the Federal Police(little sharing of information); and
- The absence of firearms license legislation.

Opportunities for the way forward:

According to PSC owners and other relevant actors, the following have been identified as possible remedies in the effort to regulate the Ethiopian private security industry:

- The declaration of tighter regulations and legislation and the implementation of international good practices such as the adoption of the Montreux Document;
- The development of a computerised database and registration system for all the registered security officers and PSCs;
- The imposition of sector-wide standards for training;
- The introduction of minimum wage for the guards, to be raised over time; and
- The allocation of adequate financial and human resources to the Federal Police and oversight of cooperation with PSCs.

2. Regional Regulatory Frameworks

During the Regional Conference, delegations received presentations from representatives of the African Union Commission as well as experts in security sector reform from the ECOWAS region. In the interventions and the ensuing discussions, it was clear that African organisations recognise the importance of regulating PMSCs as part of good governance of the security sector and the implementation of obligations under international law in the region. However, significant challenges exist when it comes to translating international norms into concrete policies/directives and guidance for member states in the region.

The African Union Commission:

In 2014, the 3rd Annual High Level Dialogue on Democracy, Human Rights and Governance in Africa was held in Dakar Senegal. Its theme, “Silencing the Guns: Strengthening Governance to Prevent, Manage and Resolve Conflicts in Africa” explored the structural root causes of conflicts in Africa and proposed policy measures to address violent conflicts within the continent. The event was organised by the AU Commission, the AU Department of Political Affairs and the Government of Senegal, and noted in its concluding high level Outcome Statement:

African states should invest more resources in managing, regulating and controlling private security companies, which operate in national settings and across borders. The conference called upon the African Union Commission to propose a code of standards and practice for private security companies that operate at a regional level or in multi-country settings as well as mechanisms for ensuring their regional/continental accountability by December 2015.⁵⁰

Most recently, the African Union has also acknowledged the activities and impacts of PMSCs as significantly linked to other security issues, such as terrorism. In January 2016, the African Union Commission on Human and Peoples’ Rights launched the “Principles and Guidelines on Human and People’s Rights while Countering Terrorism in Africa,” which (amongst others issues) contains a chapter on private security contractors and refers to the Montreux Document. Prior to this, the AU had only addressed the issue of mercenarism in the 1977 OAU Convention for the Elimination of Mercenarism. With 30 states party to the Convention and 15 signatory states, the Convention did not recognise PMSCs as business actors nor did it address their potential human rights impacts. The Convention is however, an important regional instrument given the threats posed by mercenarism to many African states since the beginning of decolonisation.

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⁵⁰ 3rd Annual High Level Dialogue on Democracy, Human Rights and Governance in Africa (2014), Outcome statement, Article 24.

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Regional Economic Communities (RECs):

The Regional Conference gathered a diversity of states which participate in a number of RECs, including ECOWAS and IGAD. In the ECOWAS community, PMSCs have been addressed on an important policy level. In June 2016, the Forty-Ninth Ordinary Session of the ECOWAS Authority of Heads of State and Government formally adopted the ECOWAS Political Framework for Security Sector Reform and Governance (SSR/G). Developed with the support of DCAF, this Policy was adopted as a Supplementary Act to the revised ECOWAS Treaty (1993), making it a full part of the fundamental legal framework for ECOWAS member states. The SSR/G policy includes regulation of PMSCs as one of its objectives and specifically mentions the Montreux Document and the ICoC. Additionally, the ECOWAS Conflict Prevention Framework⁵¹ focuses on effective security governance comprising many target groups of security actors, including “private security providers, arms brokers and suppliers (local and foreign).” To achieve these objectives, ECOWAS commits to developing, adopting, enforcing and implementing “a sanctions regime on non-statutory armed groups including militias, vigilantes and private security outfits” as well as legislation on mercenary and terrorist activities.⁵² With respect to IGAD, this regional organisation saw its mandate expanded from primarily addressing drought relief to coordinating development and regional projects, as well as peace and security. IGAD therefore is rather new to the PMSC issue area. However, the 1996 IGAD charter commits member states “to promote peace and stability in the sub-region and create mechanisms ... for the prevention, management and resolution of inter and intra state conflicts through dialogue.” It should be noted that IGAD also commits “to initiate and promote programmes and projects for sustainable development of national resources.”⁵³ These documents indicate a potential role for the REC as a leader in this issue as well.

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⁵¹ Article 72 of The ECOWAS Conflict Prevention Framework: “The objectives of Security Governance shall be: [i] to eliminate threats to individual and group rights, safety, life, livelihoods, and property, and the protection of the institutions and values of democratic governance, human rights and the rule of law under a human security umbrella; [ii] to orient the focus and capacities of individuals, groups and institutions engaged in the security system to make them responsive and responsible to democratic control and adhere to basic human rights and the rule of law; [iii] to ensure the emergence and consolidation of accountable, transparent and participatory security systems in Member States.”

⁵² Articles 74(c) and (d), ECOWAS Conflict Prevention Framework.

⁵³ Agreement Establishing the Inter-Governmental Authority on Development (IGAD), Assembly of the Heads of State and Government, Nairobi: 21 March 1996, Article 7.

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Conference Reflections on the Way Forward

As demonstrated in this report, the discussions held throughout the Regional Conference were rich, varied, thoughtful and constructive, demonstrating an excellent knowledge of the subject matter by the participants. Additionally, valuable feedback from states has been gathered on international and regional initiatives, and most significantly, on the superior role of national regulatory mechanisms in this issue.

The co-hosts of the Regional Conference have also gathered significant knowledge on the ways forward in supporting states to understand and implement international obligations related to PMSCs, such as through the Montreux Document. Although the Regional Conference did not adopt formal conclusions, this section offers a summary wrap-up of the main recommendations, ways forward, and concrete needs that were discussed in the concluding session.

1. Building Research and Knowledge on Activities of PMSCs at Local Levels

During the concluding panel, it was acknowledged by a number of participants that more information, research and knowledge is needed, particularly on local and municipal levels regarding the experiences and challenges with PMSCs. It is very difficult to find accurate and up-to-date information on the industry in many states. More research into the expansion, services, and clients of PMSCs will facilitate tailored regulatory approaches and policies. Specifically, some of the main research gaps include:

- Lack of clarity on the issues of labour rights, particularly when extractive industries hire PSMCs;
- Lack of data on how many PMSC personnel carry weapons, as a well as the training, registration/licensing and safe storage of firearms;
- Inadequate information on the ownership and management structures of companies; and
- Little recognition of the transnational nature of these companies in legislation.

2. Increasing Dialogue and Connecting with National and Local Contexts

Although the international initiatives to regulate PMSCs have often been negotiated with a wide geographical diversity of states, there are challenges in translating these regulatory options for regional and local contexts. On this basis, a number of Conference participants expressed that there should be efforts to connect the draft Convention on PMSCs as well as the Montreux Document to policy and lawmakers in all levels of African state security sectors, particularly parliaments, oversight committees, executive branches, line ministries, and police. To increase the role of home governments, specific practical tools can be developed in the form of parliamentary handbooks, contract guidance tools and training manuals which are also in line with international norms and standards.

Furthermore, there is a need to integrate community voices in this dialogue; local communities often have unique experiences with PMSCs that are not adequately reflected in the various high-level dialogues. Effective implementation of national regulation is often highly dependent on communities' effective integration into the discussion.

Additionally, there is a need to increase knowledge and clearly define the terminology. It would be particularly helpful to draw a distinct line between "private militaries" and "mercenaries" on one hand, and "PMSCs as business enterprises" on the other. Several Conference participants expressed that more outreach is needed to clarify these distinctions.

3. Strengthening Support for International Initiatives to Regulate PMSCs

Support for regulating PMSCs can be incorporated as part of a holistic approach to good governance of the security sector, taking into consideration the significant potential impacts of private actors on human rights and IHL. National authorities should implement legislation in accordance with their state's obligations under human rights and IHL instruments, which they have ratified or acceded to. On this basis, there are opportunities for both regional and national actors to integrate the regulation of PMSCs into their strategic initiatives. As one example of this currently in practice, ECOWAS specifically notes the issue as an objective of its Political Framework on SSR/G and cites both the Montreux Document and ICoCA as guidance to support better regulation of PMSCs. Furthermore, national governments can strengthen support for the Draft Convention on PMSCs, as well as initiatives like the Montreux Document and VPs by integrating these issues into the regulation of public-private partnerships. A number of Conference participants expressed

that throughout the region, private security companies and public security forces often collaborate on issues of urban policing or guarding of extractive industry sites; referring to and implementing the relevant international initiatives in local regulations can also be an effective way to make use of good practices.

Additionally, during the closing panel, the conveners of the Montreux Document expressed the hope that more African states and organisations would become involved in the initiative. All states and international organisations are invited to join the Montreux Document by communicating their support to the Swiss Federal Department of Foreign Affairs through an official letter or diplomatic note. By doing so, Montreux Document participants declare their political support for the initiative’s main focus, namely that international legal obligations have a bearing on PMSCs and must be respected. Furthermore, Montreux Document participants have the opportunity to actively participate in the Montreux Document Forum (MDF) and share experiences on the implementation of the rules and Good Practices of the Montreux Document. Through the MDF, practical tools are provided to support states in implementing regulation nationally, including a Legislative Guidance Tool for States to Regulate PMSCs. This practical handbook aims to provide concrete guidance to parliamentarians, policy and lawmakers to develop or update national regulation related to PMSCs in line with internationally recognised good practice.

4. Supporting the Role of AU and RECs in Promoting the Implementation of Regulations on PMSCs

A number of Conference participants clearly expressed that a regional or African-led process would contribute to allaying concerns and building confidence in African national measures to regulate PMSCs. An African policy towards PMSCs could be articulated and the discourse of “mercenarism” could be updated to address the regulatory challenges related to PSMCs today. Several Conference participants called for a continental framework dealing with this issue as the AU is the recognised leader in approaching a diversity of common security challenges in the region.

ECOWAS and IGAD as well as other RECs are significant organisations that are able to bring states together to address common challenges. While recognising the diversity of African states, experiences with PMSCs are nonetheless often shared and many good practices can be adapted to various contexts. Regional organisations therefore can play a major role in bringing states together on issues and can help find common ways of addressing PMSC security challenges through local-led processes.

Annex I
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The Diversity of the Private Military and Security Industry in Sub-Saharan Africa

A Background Paper

By
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Background

Private military and security companies are increasingly marking the security landscape of countries across the world and are thereby also of growing interest to academics and policymakers. The expansion and growth of the industry is particularly palpable on the African continent where companies, such as G4S and Securitas, are commonplace. Within the industry, a common distinction is made between private military companies and private security companies.⁵⁴ There is no standard definition of a “military company” or a “security company”. Generally, certain services are traditionally understood to be military in nature (like support to combat operations), while others are typically related to security or police-like activities (such as guarding and surveillance).⁵⁵ Both types of companies are frequently employed by states, organisations, corporate bodies, and individuals for protection within insecure environments. The two are often interrelated, and for the purpose of this paper and in alignment with the Montreux Document, the label “PMSC” industry will be used throughout to include the various types of companies operating in the industry at large.⁵⁶

Despite the overall growth of the PMSC industry, the nature and scope of the industry is not uniform across the African continent. In some countries, companies primarily focus on residential guarding, while in others, the protection of crucial sites, such as mines, is of primary concern. In some contexts, internationally owned companies comprise the market, while domestically owned companies are the leading players in others. This diversity is also found in the various means in which the industry is regulated, including regulations that determine whether PMSC are permitted to carry arms, and how PMSCs should interact with other state institutions, such as the police.

In order to highlight the diversity of the PMSC industry in Sub-Saharan Africa, this background paper will present three case studies: South Sudan, Kenya, and South Africa. The first case study analyses the relationship between the humanitarian sector and the PMSC industry in South Sudan. The second case study investigates

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⁵⁴ Sabelo Gumedze, ed., *Private Security in Africa. Manifestation, Challenges and Regulation* (Pretoria: Institute for Security Studies (ISS), 2007); Fred Schreier and Marina Caparini, *Privatising Security: Law, Practice and Governance of Private Military and Security Companies* (Geneva: Centre for the Democratic Control of Armed Forces, Occasional Paper 6, 2005); Peter Warren Singer, *Corporate Warriors. The Rise of the Privatised Military Industry* (Ithaca & London: Cornell University Press, 2003); Michelle Small, “Privatisation of Security and Military Functions and the Demise of the Modern Nation-State in Africa”, Occasional Paper Series, ACCORD 1 (2006): 3–104; Caroline Holmqvist, *Private Security Companies. The Case for Regulation* (SIPRI Policy Paper no. 9, 2005).

⁵⁵ See also the Montreux Document, p. 38.

⁵⁶ The Montreux Document defines private military and security companies as “private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include in particular, armed guarding and protection of persons and objects, maintenance and operation of weapons systems, prisoner detention and advice to or training of local forces and security personnel.”

the challenges in state regulation of the PMSC industry in Kenya. The third case study on South Africa will portray how the PMSC industry operates with two state bodies: the Private Security Industry Regulatory Authority (PSIRA) and the state police. In each case study, existing and proposed legislation is mentioned.

This background paper thus comprises three cases that each focus on a significant theme and country, thereby highlighting the diversity of the PMSC industry in Sub-Saharan Africa. These three case studies have been selected on the basis of relevance as each case study represents a prominent theme occurring in the region. The case studies have also been chosen due to the availability of primary research conducted in each site: 3 weeks in South Sudan in November 2010, twenty months in South Africa between 2007–2010, and four months in Kenya between 2014–2015. This paper will therefore draw from qualitative data gathered by the author during this time.

In addition to describing the regional context of the PMSC industry, the paper also seeks to identify opportunities for more effective regulation of PMSCs on domestic, regional and international levels, and will particularly focus on the Montreux Document. The Montreux Document is an intergovernmental initiative that has the fundamental aim of promoting the adherence to international humanitarian law and human rights law, particularly when PMSCs operate during armed conflict. Adopted on 17 September 2008 after intergovernmental consultations, coordinated by the government of Switzerland and the International Committee of the Red Cross (ICRC), the Montreux Document has the fundamental aim of reminding states of their legal obligations, raising awareness of the humanitarian concerns at play when PMSCs operate in armed conflict, and offering guidance on how international law could be applied. The Montreux Document has inspired the development of the International Code of Conduct for Private Security Service Providers Association (ICoCA), which is a multi-stakeholder initiative supported by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), aimed at increasing transparency within the industry at large. This paper thus also aims to analyse how such initiatives can support implementation of regulation at various levels and seeks to identify how states can implement the rules and Good Practices outlined in the Montreux Document. This will primarily come back in the last section of this paper, which comprises recommendations and remarks on how to improve the regulation of the PMSC industry.

The PMSC Industry in Africa

In 2011, the Small Arms Survey estimated that the global value of the PMSC industry worldwide was about USD 100–165 billion per year, and that the industry

experiences annual growth rates between 7–8 per cent.⁵⁷ Although North America and Europe accounted for the largest share of the global market (70 per cent) in 2011, developing countries are experiencing higher growth rates, and we can assume that these parts of the world will constitute a larger portion of the market in the near future, both in terms of providers and consumers.⁵⁸ Furthermore, based on a review of 70 countries, the Small Arms Survey also estimated that the industry employs between 19.5 and 25.5 million people worldwide, thereby exceeding the global number of police officers.⁵⁹

The PMSC industry has also grown extensively on the African continent. The leading company across the globe, G4S, operates in at least 26 African countries,⁶⁰ and several other internationally owned companies, such as ADT and Chubb, are also leading players. Based on a study conducted by the United Nations Office on Drugs and Crime (UNODC), individuals across seven African countries were asked whether they think the phenomenon of policing functions being performed by private security is a good development. Despite varying answers, all countries scored above 50 per cent, entailing that more than half of the respondents answered “yes”.⁶¹ Table 1 has been compiled from various sources to provide an overview of some of the figures of the PMSC industry in Africa. The Table demonstrates that the picture is very diverse, with South Africa having the largest private security industry, valued at approximately two per cent of the country’s total GDP.⁶² In South Africa, there are 806 private security company personnel per 100,000 people; in contrast, there are 59 per 100, 000 in Sierra Leone. However, we must also keep in mind that these figures only include registered companies and do not account for unregistered entities.

Although there is plenty of research on the PMSC industry, much of this analysis has focused on the role of companies such as Executive Outcomes and Sandline International, which are often labelled as “mercenaries” and are heavily criticised for engaging in activities that do not abide by international law.⁶³ Although the activities

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⁵⁷ Nicolas Florquin, “A Booming Business. Private Security and Small Arms,” in *Small Arms Survey 2011: States of Security* (Cambridge: Cambridge University Press, 2011), 100–133. The website can be accessed online: <http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2011/en/Small-Arms-Survey-2011-Chapter-04-Annexe-4.1-EN.pdf>

⁵⁸ Rita Abrahamson and Michael C. Williams, *Security Beyond the State. Private Security in International Politics* (Cambridge: Cambridge University Press, 2011), 40.

⁵⁹ Florquin, “*Small Arms Survey*”, 103.

⁶⁰ Information accessed from the Group 4 Securicor website on May 28th 2015: www.g4s.com.

⁶¹ Florquin, “*Small Arms Survey*”, 106. The seven countries included and their scores were: Ghana (93 per cent), Uganda (88 per cent), Tanzania (81 per cent), Rwanda (65 per cent), Egypt (64 per cent), Cape Verde (62 per cent), and Kenya (57 per cent).

⁶² Jaap de Waard, “The Private Security Industry in International Perspective,” *European Journal on Criminal Policy and Research* 7 (1999): 143–174; Anne-Marie Singh, *Policing and Crime Control in Post-apartheid South Africa*. (Aldershot: Ashgate Publishing Limited, 2008).

⁶³ See Herbert M. Howe, “Private security forces and African stability: the case of Executive Outcomes,” *The Journal of Modern African Studies* 36 (1998): 301–331; Jeremy Hardin, “The mercenary

of such companies deserve attention and analysis, a predominant emphasis on their activities maintains the perspective that the growth and expansion of the PMSCs is primarily due to state absence, failure, and/or weakness. Although state withdrawal, and in some cases state absence, is certainly one of the factors of the growth of the PMSC in Africa (and elsewhere), the situation is much more complex.

Table 1: Private Security Personnel in Africa⁶⁴

COUNTRY	YEAR	PRIVATE SECURITY PROVIDERS	PRIVATE SECURITY PERSONNEL
Angola	2004	307 (140 registered and 167 pending registration)	35,715
DRC	2008	35–45	25,000
Ivory Coast	2009	300	50,000
Kenya	2007	2000	300,000
Nigeria	2005	1500–2000	100,000
Senegal	2008	150	25–35,000
Sierra Leone	2005	30	3,000
South Africa	2014	8144	487,0581 ^a
Uganda	2008	58	17,000

^a This figure only includes the “active” registered private security officers, which is to say security officers who are actively employed in the industry. PSIRA also maintains a database of “inactive” registered security officers, that is, security officers who are registered with PSIRA but are not currently employed in the industry. In 2013, there were a total of 1,868,398 registered security officers.

business: ‘Executive Outcomes,’ *Review of African Political Economy* 24 (1997): 87–97. Jakkie Cilliers and Peggy Mason, eds., *Peace, profit or plunder? The privatisation of security in war-torn African societies* (Pretoria: Institute for Security Studies, 1999); Doug Brooks, “Messiahs or mercenaries? The future of international private military services,” *International Peacekeeping* 7(2000): 129–144; Željko Branović, *The Privatisation of Security in Failing States – A Quantitative Assessment*. Occasional Paper 24 (Geneva Centre for the Democratic Control of Armed Forces, 2011).

⁶⁴ Data collected from the following sources (in order as appeared in Table 1): for Angola: Ulrike Joras and Adrian Schuster, eds., *Private Security Companies and Local Populations: An Exploratory Study of Afghanistan and Angola* (Bern: Swisspeace, 2008), 46; for the DRC: Meike de Goede, “Private and Public Security in Post-War Democracti Republic of Congo,” in *The Private Security Sector in Africa: Country Series*, edited by Sabelo Gumedze, (Pretoria: Institute of Security Studies, 2008), 42; for Ivory Coast: Baudelaire Mieu, “Côte d’Ivoire: Security Business,” *Jeune Afrique*, 8 September 2009, Accessed on May 28th 2015: <http://www.jeuneafrique.com/Article/ARTJAJA2538p060-061.xml0/s-cu-rit-c-te-d-ivoire-c-te-d-ivoire-security-business.html>; for Kenya: Kennedy Mkutu and Kizito Sabala, “Private Security Companies in Kenya and Dilemmas for Security,” *Journal of Contemporary African Studies* 25 (2007): 391–416; for Nigeria: Rita Abrahamson and Michael C. Williams. *The Globalisation of Private Security: Country report Nigeria*. (Aberystwyth: Department of International Politics, University of Wales, 2005), 3; for Senegal: Cyrus O’Brien, “The Dynamics of Private Security in Senegal,” *Review of African Political Economy* 35 (2008): 655; for Sierra Leone: Rita Abrahamson and Michael C. Williams. *The Globalisation of Private Security: Country report Sierra Leone* (Aberystwyth: Department of International Politics, University of Wales, 2005), 7; for South Africa: Annual Report 2013–2014, Private Security Industry Regulatory Authority (PSIRA), accessed online May 28th 2015, www.psir.co.za; and for Uganda: Solomon Wilson Kirunda, “Private and Public Security in Uganda,” in *The Private Security Sector in Africa: Country Series*, edited by Sabelo Gumedze, (Pretoria: Institute of Security Studies, 2008), 6.

In fact, many studies have shown in many cases, the PMSC industry has grown due to direct contracting by state bodies and private clients (for example mining companies), rather than due to state absence or failure.⁶⁵ Other reasons have included the downsizing of militaries and the subsequent over-supply of demobilised military personnel; neoliberal economic models that encourage privatisation in general; the involvement of companies in training activities as part of security sector reform (SSR) initiatives; and the growing presence of international corporate entities and personnel involved in humanitarian aid and development.⁶⁶ Similarly, other research has indicated that the private provision of security has been a common trend among many countries in Africa. In this context, security has never been perceived or provided as a public good in Africa; non-state actors have always played a fundamental role in the provision of security.⁶⁷

There are numerous forms of regulation in Africa, such as Angola (the Law of 30 July 2014 on Private Security Companies); Cameroon (the Decree of 2005 Implementing the 1997 Law on Private Guarding Services); the Democratic Republic of the Congo (1998 Ordinance on Private Security Companies); Lesotho (the Private Security Officers Act of 2002); Mozambique (the Constitutional Accord on Regulating Private Security Companies); Namibia (the 2002 Security Officers and Security Enterprises Act); Swaziland (the Regulation of Wages of the Security Services Industry, Order 2011); Uganda (the Police Act of 1994); and Zimbabwe (the Private Investigators and Security Guards (Control) Act of 2001, Chapter 27:10).⁶⁸ South Africa has the most extensive and comprehensive regulation system, and is often used for comparison for international standards, as will become clear in the third case study.⁶⁹ In general, one of the main concerns regarding the PMSC industry in Africa is the weakness of this legislation and its applicability to PMSCs who have a potential to affect human rights.

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⁶⁵ Rita Abrahamsen and Michael C. Williams, *Security Beyond the State. Private Security in International Politics*. (Cambridge: Cambridge University Press, 2011); Tessa Diphooorn, *Twilight Policing. Private Security and Violence in urban South Africa*. (Berkeley: University of California Press, 2015); Deborah Avant, *The Market for Force. The Consequences of Privatising Security*. (Cambridge: Cambridge University Press, 2005). Bruce Baker, *Security in Post-Conflict Africa: The Role of Nonstate Policing* (Boca Raton, Florida: CRC Press, 2010); Bruce Baker, *Multi-Choice Policing in Africa* (Uppsala: Nordiska Afrikainstitutet, 2008); Sabelo Gumedze, ed., *Private Security in Africa: Manifestation, Challenges, and Regulation* (Pretoria: Institute for Security Studies, 2007).

⁶⁶ Baker, *Multi-choice Policing in Africa*; Rita Abrahamsen and Michael C. Williams, "Securing the City: private security companies and non-state Authority in global governance," *International Relations* 21 (2007): 237–253; Sabelo Gumedze. *The private security sector in Africa. The 21st century' major cause for concern?* ISS Paper 133 (2007).

⁶⁷ Jeffrey Isima, "Regulating the Private Security Sector: An Imperative for Security Sector Governance in Africa," *Journal of Security Sector Management* 5(2007): 1–16.

⁶⁸ See the website of the Private Security Monitor to access the full-texts documents of these Acts: http://psm.du.edu/national_regulation/index.html

⁶⁹ In particular, some countries have specific legislation for particular fields. In Angola, for example, the Mining Law no. 16/94 of 1994 outlines the operations of private security companies hired by mining companies.

South Sudan: The PMSC Industry and Humanitarian Aid

This section analyses how PMSCs are employed by the humanitarian sector in South Sudan.⁷⁰ South Sudan, officially the Republic of South Sudan and previously a part of the much larger territory of Sudan, is the world's newest state, gaining independence on 9 July 2011. This independence occurred after a referendum was held between 9–15 January 2011, which was part of the Comprehensive Peace Agreement (CPA) that was signed between the government of Sudan (GoS) and the autonomous government of Southern Sudan (GoSS) after decade-long fighting between the North and the South. Since December 2013, South Sudan has faced large-scale civil unrest and many parts of South Sudan are regarded as highly insecure and inaccessible.

Over the past decade (before and after independence), South Sudan has been a major recipient of humanitarian assistance. In 2012, South Sudan received US\$865 million in international humanitarian assistance, making it the world's second largest recipient. Humanitarian assistance peaked at US\$949 million in 2013.⁷¹ This humanitarian assistance has come from bilateral donors, various UN organisations, and smaller NGOs. Considering the continuing volatile situation in South Sudan, the protection of staff has been one of the key concerns and one of the driving reasons for employing PMSC, which is similar to other parts of the world.⁷² The available literature on the relationship between the humanitarian sector and the PMSC industry is growing, with a predominant focus on the advantages and disadvantage this carries, and the procedures that organisations must implement when recruiting PMSC, two elements that this section will not delve into.⁷³

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⁷⁰ For more information about the role of the PMSC/PSC in Darfur, see: Anna Leander and Rens Munster, "Private Security Contractors in the Debate about Darfur: Reflecting and Reinforcing Neo-Liberal Governmentality," *International Relations* 21(2007): 201–216.

⁷¹ Global Humanitarian Assistance, website accessed May 24th 2015: <http://www.globalhumanitarianassistance.org/countryprofile/south-sudan>

⁷² James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study* (New York: International Peace Academy, 2006);

⁷³ Birthe Anders, "Tree-huggers and baby-killers: The relationship between NGOs and PMCs and its impact on coordinating actors in complex operations," *Small Arms & Insurgencies* 24 (2013): 278–294; "Private Military and Security Companies and Humanitarian Action", Professional Development Brief 1 (Geneva: Security Management Initiative, 2009); Tony Vaux, Chris Seiple, Greg Nakano and Koenraad Van Brabant, *Humanitarian Action and Private Security Companies. Opening the Debate* (London: International Alert, 2002); Max P. Glaser, *Engaging Private Security Providers. A Guidelines for Non Governmental Organisations* (European Interagency Security Forum (EISF), 2011); Jean S. Renouf, "Understanding How the Identity of International Aid Agencies and Their Approaches to Security Are Mutually Shaped" (Phd diss., London School of Economics and Political Science, 2011); Gumedze, *Private Security in Africa*; Abby Stoddard, Adele Harmer and Victoria DiDomenico, *The use of private security providers and services in humanitarian operations*, (London: Overseas Development Institute, 2008); Christopher Spearin. "Private security companies and humanitarians: A corporate solution to securing humanitarian space?" *International Peacekeeping* 8(2001): 20–43; Christopher Spearin. "Private, Armed, and Humanitarian? States, NGOs, International Private Security Companies and Shifting Humanitarianism," *Security Dialogue* 39(2008): 363–382.

A few decades ago, most humanitarian organisations did not have a clear security strategy; rather, their approaches were ad hoc, unsystematic, and reactive to incidents that happened in the field.⁷⁴ This changed in the early 1990s when various companies began providing particular services to UN agencies, such as the logistic support to the UN Mission in Sierra Leone (UNAMSIL) and the management of air traffic control for the UN Mission in DRC (MONUC). Since then, several companies, such as Defence Systems Limited (DSL), Dyncorp, and ArmorGroup, have assisted humanitarian clients in numerous ways, such as guarding, analysing security intelligence, and providing armoured escorts. Numerous UN bodies have relied on the expertise of such companies, such as United Nations High Commissioner for Refugees (UNHCR), United Nations Development Programme (UNDP), and the United Nations World Food Programme (WFP).⁷⁵ And as the incidents of violence against aid workers have increased throughout the past decade, the use of PMSCs in the humanitarian sector has also increased, although armed protection remains an exception.⁷⁶ Currently there are three types of private security companies that operate in conflict and post-conflict areas, such as South Sudan: internationally-owned companies,⁷⁷ domestic companies that tend to be more informal and primarily recruit local staff, and state security forces that “moonlight” a private capacity on the side.⁷⁸ This refers to state security personnel, such as police officers or military soldiers, who provide security services (primarily guarding) to clients for an additional income.

In South Sudan, the PMSC industry is primarily engaged in the protection of individuals working in the humanitarian sector, and thus focuses on guarding, logistical support, evacuation and emergency response, access control, and the installation of CCTVs, alarm systems, and perimeters. ⁷⁹ In 2011, Mark Duffield described Juba as “a series of privately guarded gated-communities that provide refuge for its plural elites” and that “it is rare to find international NGOs that do not employ a private security company to guard their gates”.⁸⁰ He further mentioned several companies, such as RedR and Armadillo, which provide a range of consultancy and risk-management services for the humanitarian sector. Other companies currently operating in South

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⁷⁴ Jean S. Renouf, “*Understanding How the Identity of International Aid Agencies and Their Approaches to Security Are Mutually Shaped*” (Phd diss., London School of Economics and Political Science, 2011).

⁷⁵ Åse Gilje Østensen, *UN Use of Private Military and Security Companies: Practices and Policies*. (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2011); Spearin, “*Private security companies and humanitarians*”, 28.

⁷⁶ Stoddard, Harmer and DiDomenico, *The use of private security providers*, 7–8.

⁷⁷ See Stoddard, Harmer and DiDomenico, *The use of private security providers*, 41–43: Annex 3 of the international companies that operate in humanitarian operations.

⁷⁸ Cockayne, *Commercial Security*, 1.

⁷⁹ Michon Motzouris, *Conference Report on the Involvement of the Private Security Sector in Humanitarian Assistance Operations in Africa* (Pretoria: Institute for Security Studies, 2011), 14–15.

⁸⁰ Mark Duffield, “*Juba Report. August 2011*”, University of Bristol, 3. Accessed May 28th 2015: <http://www.bristol.ac.uk/media-library/sites/global-insecurities/migrated/documents/juba.pdf>.

Sudan, particularly Juba, include G4S, KASS, Afex Security, and Warrior Security. In addition to the work conducted in Juba, there are also reports that indicate more risky and labour intensive services, such as the \$7 million contract that the United Nations awarded to Armor Group/G4S in 2006 for the mapping and clearing of mine fields.⁸¹

The major challenge in South Sudan regarding the PMSC industry concerns the ownership of the companies and the type of clients. During an interview conducted with a humanitarian aid worker in Juba, she stated that these companies “are absolutely everywhere in Juba”. She further highlighted that they are “fuelled by the international community” and are not employing locals, and therefore play a key role in consolidating the socio-economic differences.⁸² When speaking to the owners and managers of internationally operating companies in Kenya in 2015, they described South Sudan, and especially Juba, as a “fresh new market” filled with lucrative opportunities, primarily due to the highly insecure environment and large presence of the international community. Yet these owners also discussed the problems associated with setting up a company or subsidiary in South Sudan due to a prerequisite of local ownership.

The South Sudanese government is actively promoting the establishment and use of local companies that are reputed to work well with the state security forces. One example is the Veterans Security Services (VSS), which is the only licensed armed security company in South Sudan. Only the President of South Sudan can authorise licenses for private security companies. The company’s website states that most of the security officers are demobilised combatants from the Sudan’s People’s Liberation Army (SPLA), and that the company is “closely linked” to the Veteran’s Association of the SPLA, thereby clearly implying the connections to state security forces.⁸³ State encouragement of local ownership is also evident in the fact that all companies operating in South Sudan are required to have a local shareholder, in addition to being registered and requiring permission to operate from the Minister of Internal Affairs.

This element of local ownership has created problems for many international owners, as according to whom these South Sudanese business men often had direct ties to the South Sudanese government.⁸⁴ This was perceived as problematic, particularly since the re-emergence of violence between different local parties since December

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⁸¹ Østensen, *UN Use of Private Military and Security Companies*, 35. For a more personalized account of some of these operations of G4S in South Sudan, read: William Langewiesche, “The Chaos Company,” *Vanity Fair*, April 2014, accessed May 28th 2015: <http://www.vanityfair.com/news/business/2014/04/g4s-global-security-company>.

⁸² Interview: humanitarian aid worker, Juba, Skype interview, July 2, 2015.

⁸³ The website of the Veterans Security Services (VSS): <http://www.vssouthsudan.com>.

⁸⁴ Although several interviewees voiced this opinion, the main source is an interview conducted with a private security company owner in Nairobi, April 27, 2015.

2013. State involvement is in this perspective regarded as a potential weakness and security problem, yet it is also needed in order to obtain this approval from the Minister. Furthermore, these owners highlighted that humanitarian organisations generally prefer to work with international companies, because of the perception that local companies are too closely aligned with state security forces.

To conclude: South Sudan is an example of how the PMSC industry is linked to the humanitarian sector and how the large presence of the international community can fuel the growth of the PMSC industry. Furthermore, South Sudan also highlights the blurring of lines between public and private security, as many local companies are regarded to have direct connections with the state or other armed actors. Humanitarian and development organisations want to recruit local companies as a means of boosting the local economy, but also regard these companies are potential security risks, precisely due to their alleged links with the South Sudanese government. This further highlights the need for more elaborate state regulation that can provide a coherent and legal framework in order to restrict such direct connections between PMSCs and the state armed forces.

State Regulation of Private Security in Kenya

This section analyses the regulation of the PMSC industry in Kenya. The Kenyan private security industry has operated since the 1960s and has experienced an exponential boom in the last two decades, particularly after the Westgate mall attack in September 2013.⁸⁵ It is estimated that over 2000 private security companies operate in Kenya, of which only 900 are officially registered, and the industry is estimated to have an annual turnover of KSh32.2.billion (US\$43 million).⁸⁶ The industry accounts for over 300,000 employees, compared to 40,000 police officers.^{87,88} Among the wide range of security services that are provided, including cash-in-transit and electronic monitoring, guarding services constitute the majority with 47 per cent of the industry.⁸⁹

The PMSC industry in Kenya faces two major issues that are publicly debated by state officials, private security personnel, and citizens in general, namely the labour conditions of the industry and the arming of private security personnel. These two issues are intrinsically linked to the matter of state regulation, or better said, the *lack* of state regulation in Kenya. The Private Security Regulation Bill was introduced to

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⁸⁵ Anne, Soy, (19/09/2014). Kenyan security industry grows in Westgate aftermath. Retrieved and accessed on 20 June 2015 from <http://www.bbc.com/news/business-29253098>.

⁸⁶ Francis Wairagu, Jan Kamenju, and Mwachofi Singo, *Private Security in Kenya*. (Nairobi: Security, Research and Information Centre (SRIC), 2004).

⁸⁷ Mkutu and Sabala, *Private Security Companies in Kenya*.

⁸⁸ At the time of writing, many industry personnel repeatedly used the figure of 400,000 security personnel, and it was presented and accepted as a reliable amount.

⁸⁹ Wairagu et al., *Private security in Kenya*, 29.

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the National Assembly in March 2014. Although the Bill is still pending at the time of writing, it is at the stage of a second reading in parliament and numerous private security personnel are optimistic that it will be passed this year.⁹⁰

Throughout interviews with members of the PMSC industry, state officials (such as police officers), and other interested parties, numerous reasons were given for the delay in implementation of the proposed Bill. The first and most common reason was the introduction of the new constitution in 2010. Due to this profound change, other new legislative amendments and Bills have been given priority, and as a result, the ratification of the Regulation Act has been delayed. Other individuals, particularly private security personnel, claim that state regulation is not in the interest of the government, as members of parliament and government officials are alleged to have links to security companies. There is a perception of a large informal sector to the industry, thereby frustrating legitimate private security companies.⁹¹ These concerns pertain to the unregistered companies – referred to as “briefcase companies” and “Juakalis”⁹² that would be the primary target of the new state regulation. Thirdly, as outlined in part six of the proposed Bill, state regulation would inherently demand a national framework that oversees interactions between the industry and particular state bodies, such as the state police. This would therefore demand the Kenyan government to outline an official policing partnership strategy with the PMSC industry, which is currently rather ad hoc. Fourthly, state regulation would imply much tighter regulations and inspections on minimum wage issues, which is regarded by many within and outside the industry as the most pressing and problematic issue in Kenya. Locally hired security officers are reputed to earn far below minimum wage and the private security industry is very often described as highly exploitive. Furthermore, state regulation would also need to address the question of arming private security companies, which has been debated for the past decade.⁹³ At the time of research (2015), this was still a pending issue and was regarded as highly controversial. Most company owners are against the arming of their guards and such concerns were also voiced during this research.⁹⁴ Yet other company owners also supported the move to arming security officers and primarily focused on arming security officers working in particular sectors, such as cash-in-transit or alarm response.⁹⁵

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⁹⁰ A copy of the proposed Bill can easily be accessed online, for example on the following website: <http://www.cickenya.org/index.php/legislation/item/61-the-private-security-industry-regulation-bill#.VWrTeGATHzl>.

⁹¹ Interviews: manager of private security company, Nairobi, March 20, 2014; owner of private security company, Nairobi June 3, 2015.

⁹² Juakali means under the “hot sun” in Kiswahili, and has been translated to me as “without shelter”. It is a generic term often used to refer to the informal sector in general.

⁹³ Mkutu and Sabala, *Private Security Companies in Kenya*.

⁹⁴ Rita Abrahamson and Michael C. Williams. *The Globalisation of Private Security: Country report Kenya* (Aberystwyth: Department of International Politics, University of Wales, 2005), 16.

⁹⁵ Interview: owner of a private security company, Nairobi, April 21, 2015.

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Although there is presently a lack of legislation, there are requirements for registering companies. All businesses in Kenya, regardless of the sector they operate in, are registered under the Companies Act of Kenya and fall under the Ministry of Trade and Industry.⁹⁶ All wage issues are monitored under the Ministry of Labour. Private security firms are thus registered as “businesses” and are governed by general business laws that apply to all companies, such as trade license and labour laws. However, under this system, PMSCs are treated as other businesses and there is no further registration or monitoring requirements of security-related activities and no set of standards to control the quality of their services. This also means that any individual is capable of registering, and thus establishing a company. There is no vetting of individuals for the necessary expertise, skills, and training to effectively carry out tasks.⁹⁷ Additionally, there is no standard system of background checks on security personnel of PMSCs.

Due to an absence of state regulation, regulation in Kenya primarily occurs through self-regulation mechanisms conducted by two industry associations: the Kenya Security Industry Association (KSIA)⁹⁸ and the Protective Services Industry Association (PSIA).⁹⁹ KSIA has 30 company members, mainly comprising the larger companies. KSIA has endorsed Legal Notice 53 of 2003 regarding minimum wage of PMSC personnel. The Protective Services Industry Association (PSIA) consists of 53 company members that are smaller and with which the government contracts on a larger basis. The PSIA rejected Legal Notice 53.¹⁰⁰

The lack of state regulation in Kenya clearly affects the way in which the industry operates. Although the employers’ associations have introduced some standards to regulate the growth and expansion of the industry, there is no uniformity concerning training systems, training centres, vetting procedures of staff members, and much more. However, private security personnel – from company owners to security officers – mentioned in interviews with the author that they are optimistic that the Regulation Bill will be passed and that once implemented, it will structure the industry to protect labour rights. Furthermore, there is hope that such legal guidelines, which contain legal sanctions, will eliminate the more informal and illegal elements that continue to mark the PMSC industry in Kenya.

South Africa: The PMSC Industry and Public Security

South Africa’s private security industry is the largest on the continent. Besides its vast size, the industry is also highly diverse, being categorised into 20 different types

⁹⁶ Mkutu and Sabala, *Private Security Companies in Kenya*, 402.

⁹⁷ Mkutu and Sabala, *Private Security Companies in Kenya*, 402.

⁹⁸ See the website for more information: <http://www.ksia.co.ke>.

⁹⁹ See the website for more information: www.psiasecurity.com.

¹⁰⁰ Abrahamsen and Williams, *Security Beyond the State*.

of security services by the Private Security Industry Regulatory Authority (PSIRA), the government body that regulates and monitors the industry.¹⁰¹ In addition to its size and diversity, the PMSC industry in South Africa is internationally known for its extensive regulation scheme and the cooperation between the industry and state bodies, which is the focus of this section.

In South Africa, state regulation occurs on various levels and by various state bodies. The primary regulatory body is the PSIRA, which is monitored by the Ministry of Police. Private security companies must be registered with the Authority as companies providing “security services” and must pay either monthly or annual fees to the Authority, which is determined by the Private Security Industry Levies Act 23 of 2002.¹⁰² In turn, the Act stipulates how the private security industry must operate and determines forms of (judicial) punishment in the event of misconduct. If a service provider is not registered or does not operate in accordance with PSIRA’s legislation, a charge of misconduct is opened, with the penalties differing according to the case.

The creation of the Security Officers Act (SOA) of 1987 and the accompanying Security Officers Board (SOB), was the beginning of private security regulation in South Africa. The SOA was thus the first step towards state regulation of the industry, and to gain further control over the industry, amendments were implemented to expand the scope of the industry, resulting in the Private Security Industry Regulation Act No. 56 of 2011. PSIRA has a broad scope of regulation, which is exemplified in its broad definition of a security service provider, the zero-tolerance policy with regards to inspections, and the consumer liability clause, to name a few.¹⁰³ In 2013, the PSIRA was amended by the Private Security Industry Regulation Amendment Bill, as a means of further improving the quality standards of the industry. One of the main changes of the Amendment Bill is the prohibition of foreign ownership of a South African registered company to 49 per cent; thus implying that 51 per cent ownership must be local, i.e. South African. Additionally, the Department of Labour determines the wages and employment standards, and since 2005, the Safety and Security Sector Education and Training Authority (SASSETA) monitors the security training.

In addition to state regulation, South Africa also has at least 38 industry associations.¹⁰⁴ In August 2003, the Security Industry Alliance (SIA), was founded as an overarching body for South African PMSC industry associations. The SIA established a memorandum of understanding (MOU) with government departments

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¹⁰¹ All information regarding PSIRA is available on the website: www.psira.co.za.

¹⁰² Julie Berg, “The private security industry in South Africa: a review of applicable legislation,” *South African Journal of Criminal Justice* 16 (2003): 178–196.

¹⁰³ Berg, *The private security industry in South Africa*.

¹⁰⁴ Clifford Shearing and Julie Berg, “South Africa” in *Plural Policing: a comparative perspective*, edited by Trevor Jones and Tim Newburn. (London: Routledge, 2006), 203.

and institutions, such as PSIRA, the then Ministry of Safety and Security, the Ministry of Intelligence, and SASSETA. In addition to PSIRA which regulates the PMSC industry operating within South Africa’s borders, others forms of regulation monitor the activities of South African firms and individuals operating abroad, such as the Regulation of Foreign Military Assistance (RFMA) Act that was passed in 1998, the 2006 Act on the Prohibition of Mercenary Activities, and the Regulation of Certain Activities in Country of Armed Conflict Act of 2006. Yet even despite this, several firms operating in places such as Iraq did not meet the requirements of RFMA.¹⁰⁵

In addition to state regulation, the South African government also regards the PMSC industry as a partner in the larger policing spectrum. As part of the broader political transformation that occurred after 1994, the post-apartheid state envisioned a transformation of the police from an authoritarian to a democratic force. The main aim of the police force was to restore relationships with citizens (particularly previously disadvantaged communities during apartheid rule) and this was encapsulated in the mantra of democratic community policing. This was primarily outlined in the National Crime Prevention Strategy (NCPS) of 1996 and the 1998 White Paper on Safety and Security. As another part of the overall transformation of the state police, the NCPS delineated a “multi-agency approach”¹⁰⁶ whereby the government would work alongside other partners, such as community members, businesses, and the PMSC industry, to combat crime. The “partnership policing” strategy determined how the state police would work with other policing bodies, particularly with actors that the state police had previously neglected.

However, this vision for partnership policing was to be solely determined by police officers and the idea was that the PMSC would inhabit a supportive and collaborative role.¹⁰⁷ Thus, non-state actors, such as the PMSC industry and community policing initiatives, were to act as the “eyes and ears” of the state police by providing/sharing crime intelligence and financial supports. The industry has generally welcomed the idea of establishing a more formalised partnership with the state, but has faced frustration with the lack of state response to its calls for assistance. In 1996, a submission was made by the industry to the SAPS Task Team on Partnership Policing, requesting the extension of powers (such as the power to arrest and search) to security officers.¹⁰⁸ This has also occurred at the local-street level, with company

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¹⁰⁵ Isima, “*Regulating the Private Security Sector*”, 10.

¹⁰⁶ Singh, *Policing and Crime Control*, 14.

¹⁰⁷ Anthony Minnaar, “Private-public partnerships: private security, crime prevention and policing in South Africa,” *Acta Criminologica* 18 (2005): 85–114 (89). Julie Berg, “Challenges to a formal private security industry-SAPS partnership: lessons from the Western Capem” *Society in Transition* 35 (2004): 105–124; Anthony Minnaar and P. Ngoveni, “The relationship between the South African Police Service and the private security industry: any role for outsourcing in the prevention of crime?” *Acta Criminologica* 17 (2004): 42–65; Tessa Diphoorn and Julie Berg, “Typologies of partnership policing: case studies from urban South Africa,” *Policing and Society* 24 (2014): 425–442.

¹⁰⁸ Minnaar, “*Private-public partnerships*”.

owners offering to assist local police station through joint-patrols and monthly crime meetings. Although some of these have been successful, many times such requests and offers have been rejected by state officials.¹⁰⁹ Repeated calls by previous and current Ministers of Safety and Security (now Ministers of Police) calling on private security to partner with the state in crime-fighting endeavours have further given attention to the potential of the industry.

However, there is still no state policy on official formalisation of private–public partnership policing in South Africa and no concrete guidelines. The result has been the emergence of locally or municipally based projects to enhance cooperation between private and public policing bodies and numerous informal and ad hoc interactions between police officers and private security personnel.¹¹⁰ Although these have been productive in fighting crime in local areas, they have not (as of yet) resulted in the creation of a coherent set of guidelines for police stations and companies to adhere to. Thus, although the South African regulation of the PMSC industry is applauded globally and regarded as one of the most extensive systems, more specific guidelines on how the state police must cooperate with the PMSC industry are welcomed. This is particularly crucial for the daily operations of private security officers and police officers that regularly encounter one another on “the street.” As a formalised and coherent partnership-system is lacking, their interactions are ad hoc and very often based on social and personal networks, rather than legislation.

Concluding Remarks: Promoting Regulation of PMSCs – Application of the Montreux Document in African Contexts

This paper had the fundamental aim of showing the diversity of the PMSC industry in Sub-Saharan Africa. The first case study focused on one of the most prominent themes for contemporary discussion, namely the role that the PMSC industry can play in the humanitarian sector, and the growing tendency for humanitarian agencies to deploy PMSC in highly volatile situations. Yet despite the vast amount of literature, little is known about the exact number of companies operating in South Sudan, how they operate on a daily basis, and how they impact the local South Sudanese population. This paper thus calls for more detailed research to further investigate the impact of the PMSC industry on both the humanitarian sector and the local population in South Sudan.

In the second case-study, state regulation in Kenya was discussed, an issue that is crucial for the PMSC industry worldwide. Although several African countries have some form of regulation, as was outlined in the first section, many countries lack

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¹⁰⁹ Diphorn and Berg, “*Typologies of partnership policing*”.

¹¹⁰ Diphorn and Berg, “*Typologies of partnership policing*”.

a comprehensive state regulation system. The Kenyan case highlights how state regulation is interrelated with local politics and other security-related reforms. In Kenya, increasing terrorist attacks are placing additional pressure on the state armed forces, and this makes the issue of regulation of the PMSC industry more important, but also rather challenging, particularly when it comes to the potential of equipping private security personnel with firearms. This is in contrast to the third case study, South Africa, where state regulation is extensive and where the PMSC industry is monitored through legislation and internally interacts with state armed forces. Yet even here we can see that this latter issue still demands further guidelines and specification.

All of these issues point towards an urgent need for state regulation of PMSCs. Out of the 52 countries that are participants to the Montreux Document, only four of them are from Africa, namely: Angola, Sierra Leone, South Africa, and Uganda. It is clear that PMSCs operate in the broader region. Supporting the Montreux Document has offered an opportunity for states to engage in the Montreux Document Forum (MDF) – a platform for coordination among states on issues of PMSC regulation. The MDF supports states in the implementation of more effective regulation and should address the following challenges:

- More awareness needs to be raised about the positive affects of state regulation, such as an improvement of labour conditions. More lobbying could be conducted by particular organisations, such as the International Labour Organisation (ILO), to place pressure on improving the labour conditions within the industry. Particular state bodies, such as the Ministry of Labour, can also exert pressure in order to implement legislation that ensures that private security personnel are not exploited.
- Firearm use by non-state entities is not common in all African countries, such as in Kenya. However, many African states have high numbers of armed private security personnel and this trend needs to be efficiently controlled. State regulation on firearms must include the PMSC industry.
- As highlighted by the South African case, policing partnerships between the state armed forces and the PMSC industry need to be outlined in detail in order for PMSCs and state officials to follow guidelines that all adhere to. These guidelines should cover various parts of potential partnerships, such as the sharing of crime intelligence, financial assistance, and joint-patrols.

Other recommendations outside the framework of the MDF:

- In addition to the implementation of state regulation, African countries could encourage the PMSC/PSCs operating on their territories to become members of the International Code of Conduct for Private Security Service Providers

Association. This will ensure that contracting of private security personnel is based on standards that integrate international humanitarian and human rights law, such as the prohibition of torture, human trafficking, and rules on the use of force. Secondly, by becoming members of the ICoCA, PMSC/PSCs will receive further guidelines and support on how to manage and oversee their personnel, such as issues pertaining to the vetting of staff and dealing with complaints.

- Additionally, the clients of PMSC/PSCs have a large role to play, and should also ensure that when engaging with PMSC/PSCs, they are members of the ICoCA. This not only refers to individual clients, but particularly to larger international organisations, such as UN agencies. PMSC/PSCs are more likely to become members of the ICoCA, when this requirement is built into contracts. This will automatically result in more transparency from the companies themselves that will trickle down to local security practices.
- Although state regulation is essential, industry associations, standards and other mechanisms should also be promoted. These can range from more localised employer associations, such as the Kenyan Security Industry Association (KSIA), to more internationally based associations, such as the Security Association for the Maritime Industry (SAMI). Such associations, which are largely driven by the PMSC industry, have proven to increase transparency and accountability by ensuring that PMSCs adhere to particular standards.

In conclusion, this paper has identified that the Montreux Document could be used as a useful tool to address specific challenges in the region. As a blueprint for effective national legislation, the Montreux Document contains a list of specific Good Practices for Contracting states, Territorial states, and Home states. States should implement these Good Practices through acquiring reliable information about the permits, past operations, and personnel of a PMSC before granting contracts, conducting thorough background checks; monitoring how PMSCs train and treat personnel, and how companies acquire firearms and other equipment. All countries are advised to use these Good Practices as a blueprint when engaging with the PMSC industry.

Annex II

Regulation of the Private Military and Security Industry in Africa

A Background Paper

By

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Africa is the continent most closely identified with modern PMSCs,¹¹¹ considering how the security infrastructure in the continent has evolved. Private security operatives in Africa were not very popular in the first two decades of independence. In the recent past however, the ambivalence is tempered by necessity and this has brought about some change in the way PMSCs are viewed. In addition there has been considerable growth in the industry brought about by factors such as the downsizing of militaries especially after the cold war, the proliferation of arms, the transformation of warfare where the distinction between combatant and civilians are blurred, the general insecurity in many regions of the continent and obviously the rise of neoliberal economic models that promote privatisation and so-called ‘outsourcing’ of goods and services. One factor that has become essential to understanding the overall picture of the involvement of private security operators in Africa is their role in situations of armed conflict. Indeed, PMSCs have become almost indispensable when considering the needs for stabilisation of volatile situations and security sector reform in the post conflict situations. All in all, the role of PMSCs has become prominent because African countries have failed to fulfil the security needs of their citizens, in a variety of circumstances enumerated above. States must therefore acknowledge the important role of PMSCs in creating stability and providing security.

Since PMSCs are now a reality in Africa, and the shortfall in security provision by the African state necessitates their continued existence, the big concern is that of oversight – methods of regulating their functions. To stimulate discussions in this regard, this paper will first attempt to broadly map out the evolution of the PMSC phenomenon on the continent and identify the key issues that are likely to affect the growth of regulatory regimes. Secondly, it sets out the nature of regulatory frameworks that exist and show their constraints in dealing with PMSCs issues. In this regard, the paper will focus on two case studies, South Africa and Sierra Leone, to illustrate the laws that exist and why the need for regulation is yet to be met. Lastly, the paper will briefly outline how the Montreux Document on pertinent international legal obligations and Good Practices for states related to operations

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¹¹¹ See Isenberg, Africa, the mother of all PMC, 2010, <http://industry-news.org/2010/03/22/david-isenberg-africa-the-mother-of-all-pmc/>.

of private military and security companies during armed conflicts, (herein called the “Montreux Document”) addresses the regulatory needs of states and make a case of why countries should consider adopting its framework in developing their own sets of regulatory laws.

II.

The PMSCs Factor and the Security Sector in Africa

The use of private military in Africa is not a new phenomenon. In the 1960s and early 1970s, African states were threatened by an increase in mercenary activities which destabilised governments and robbed peoples of their rights to self-determination. Mercenaries were used by weak African governments to consolidate their hold on power and by insurgents and rebel groups to overthrow regimes. It is the threat to stability of governments which defined the thrust of the discourse on privatisation of security in the continent and thereby led to the promulgation of the 1977 OAU/AU Convention on the Elimination of Mercenarism. This explains why privatisation in the security sector in Africa and especially with regard to military operations has always been viewed with scepticism. But while the quintessential mercenary or “soldier of fortune” is exiting the stage, we now have well organised companies that offer security and military services for profit. In the 1990s, private military companies acquired a distinct reputation of facilitating armed violence and natural resource extraction in areas embroiled in civil war. During the Sierra Leone and Angolan civil wars, these companies were contracted by governments to help defeat the rebels and their pay-out was largely by way of gaining access to natural resources.¹¹² This led some commentators to label such companies as “modern forms of mercenaries.”¹¹³ Questions have emerged as to whether privatisation of security in such contexts affects the sustainability of peace and stability. This could also be the factor which propelled the United Nations to establish the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, in 2005. The concern then and now has been to find ways in which activities of the private companies could be regulated so that they do not continue to violate human rights and prolong conflicts.

A. What do PMSCs do?

Unlike mercenaries, PMSCs are modern business entities that offer security to states, businesses and individuals.¹¹⁴ They function in a variety of security environments

¹¹² See e.g. Howe, Private security forces and African stability: The case of Executive Outcomes (1998) 36 (2) *Journal of Modern African Studies* 307–331. Companies such as Executive Outcomes Sandline International and Military Performance Resources Incorporated (MPRI) have been contracted to work in such volatile situations in Africa.

¹¹³ See e.g., Gumedze, Pouring old wine into new bottles? Debate around mercenaries and private military and security companies’ in S Gumedze eds., *Elimination of Mercenaries in Africa* (2008), 21.

¹¹⁴ It shall be noted that the notion of „mercenaries“ is defined under IHL and that this definition ex-

including conflict, post-conflict and peacetime situations. In Africa, they provide convoy protection, risk assessments, and logistical support to militaries, assist in post-conflict reconstruction, and in security sector reform (SSR). Historically, the operation of private militaries in the continent has been viewed with scepticism. The image of the quintessential mercenary (soldier for hire) roaming the continent and overthrowing governments has influenced most of the anti-mercenary laws that we have today. In the 1990s, the more organised outfits emerged and they found lucrative contracts in the war zones of Africa. The involvement of Executive Outcomes in the Sierra Leone civil war, for example, and its connection with resource exploitation in that region created a negative image for private security operators in the African region. In the last two decades, however, things have changed considerably. These changes are linked to globalisation and its promotion of privatisation and so called ‘outsourcing’ of goods and services. These changes have blurred the distinction between the ‘public’ and the ‘private’ domains as far as trade in goods and services are concerned, leading to the emergence of new trends. Already, we are witnessing massive fragmentation of security functions within and outside states, and an increasing number of individuals and private companies taking more active control over their own security. The state’s role now is more of ‘steering’ rather than ‘rowing’.¹¹⁵ These changes have also allowed for the more creative and meaningful use of private security services and have called for a shift from prohibition to regulation. The section below outlines the ways in which PMSCs are used presently with respect to regional security gaps.

1. Use of PMSCs in supporting peacekeeping and stability operations

The mandate of peacekeeping operations has greatly broadened since the 1990s.¹¹⁶ In the first instance, operations have expanded to involve entities other than the UN. Secondly, mandates have expanded to include multidimensional operations that involve conflict prevention, peacemaking, peace enforcement and peace building, all of which involve a variety of actors. The broadening of mandates has created opportunities for PMSCs to work closely with UN agencies, international NGOs, and governments in areas of conflict, not only as alternatives to beleaguered national armies but to shore up the apparent shortages of the UN personnel in a variety of situations where the UN involved. A range of services that have been procured from PMSCs include logistical support, training, intelligence gathering, advisory services, aviation services and base infrastructure protection.¹¹⁷

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cludes most PMSC personnel, most of whom are not contracted to fight in military operations. Therefore, international law on mercenaries is largely inapplicable to the phenomenon of PMSCs.

¹¹⁵ See Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001), 15.

¹¹⁶ See e.g. Juma, *Peacekeeping in Africa: Problems and Prospects*’ (2009) 6 (1) *University of Botswana Law Journal* 3–24.

¹¹⁷ See Olaniyan, *Unorthodox peacekeeping responses in Africa*, in S Gumedze eds., *From Market for*

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Although there was reluctance to use PMSCs in multilateral peacekeeping operations undertaken by the UN and AU in the past, the practice has changed considerably over the past decade. The use of PMSCs is now widespread in conflict management situations including stability operations.¹¹⁸ Primarily, the UN has used PMSCs to provide aviation support, armed guards and to secure the delivery of humanitarian aid.¹¹⁹ Thus, the companies mostly assist UN operations by providing specialised support services.¹²⁰ A few examples may illustrate this phenomenon. Pacific Architects and Engineers (PAE) was contracted by the UN to assist with the United Nations Mission in the Democratic Republic of the Congo (MONUC) operations in the DRC in 2001.¹²¹ In Somalia, Brown Root Services (BRS) supported Unified Task Force (UNITAF) that reinforced the work of the United Nations Operations in Somalia (UNISOM).¹²² PMSCs involvement in broader peace building initiatives first became visible in the former Yugoslavia.¹²³ In Africa, PMSCs have been involved in demining work as well as training of peacekeeping forces.¹²⁴ For example, DynCorp provided maintenance and operational support of the Liberian military.¹²⁵ The US government has financed a larger proportion of these efforts under the African Contingency Operations Training and Assistance initiative and Global Peace Operations Initiative.¹²⁶ International Charter Incorporated (ICI) was contracted by the US government to provide transportation to UN and ECOWAS forces in Nigeria, Sierra Leone and Liberia.¹²⁷ The US also contracted Pacific Architects and Engineers to help in the transfer of arms to the UN operations in Cote D'Ivoire.¹²⁸ It should also be remembered that MPRI trained the Economic Community of West African States Monitoring Group (ECOMOG) soldiers during the Liberian civil war on the

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Force to Market for Peace: Private Military & Security Companies in Peacekeeping Operations, ISS Monograph 183 (2011), 8

¹¹⁸ See e.g. Spearin, UN Peacekeeping and international private military and security industry (2011) 18(2) *International Peacekeeping* 196.

¹¹⁹ A number of UN Agencies, such as the UN High Commissioner for Refugees (UNHCR), the UN Children's Fund (UNICEF), the UN Development Programme (UNDP), and the World Food Programme (WFP), have used PMSCs in their operations. See Hull, What Future for privatised peacekeeping? Prospects and Realities in the UN Debate, FOI, Swedish Defence Research Agency 2008, 11 cited in George, The Market for peace in Gumedze ed., *From Market for Force to Market for Peace: Private Military & Security Companies in Peacekeeping Operations*, ISS Monograph 183 (2011), 21.

¹²⁰ See Ostensen, UN Use of Private Military and Security Companies: Practices and Policies, DCAF, SSR Paper No 3 (2011), 11.

¹²¹ See George, The Market for peace in Gumedze ed., *From Market for Force to Market for Peace: Private Military & Security Companies in Peacekeeping Operations*, ISS Monograph 183 (2011), 17.

¹²² *Ibid* at 21.

¹²³ *Ibid* at 25.

¹²⁴ See Singer, Corporate warriors: The Rise of the Privatised Military Industry, 82.

¹²⁵ George *supra* note 10 at 26.

¹²⁶ *Ibid*. See also Bennett, Outsourcing Africa, *ISN security watch*, 12 October 2009, <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?id=108451&lng=en>.

¹²⁷ *Ibid*.

¹²⁸ See Malan, Building Institutions on the Run, in Donald C.F. Daniel, Patricia Taft and Sharon Wiharta, *Peace operations: Trends, progress and prospects*, (2008), 94

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use of military vehicles supplied by the US government.¹²⁹ Private companies also assisted the movement of personnel and equipment during the war. Part of the US aid to African governments in their regional efforts to peace has been through the PMSCs. In Darfur, PMSCs have also provided logistical support to the African Union peacekeeping forces.

2. Security sector reform (SSR)

From a very general perspective, SSR refers to the efforts to ensure efficient and effective provision of state and human security within the framework of democratic governance.¹³⁰ Within this broad conceptualisation of SSR, the idea that reform could target not only the military forces but also other agencies internal or external though non-military nature that have influence on security policies is critical. African states generally rely on external support to carry out SSR. In post-conflict situations, the collapse of the security sector compels massive rebuilding efforts. A security sector that is functioning, legitimate and accountable is crucial for the establishment of democratic governance and the observance of the rule of law. These efforts require financial capital which is not often available. This has created a capacity gap which strains governmental action and threatens the peace building project. In turn however, the gap creates an environment which is conducive to outsourcing of services. The shift towards market based outsourcing of services and public-private partnerships allows for the contracting of various services including security services.¹³¹ Thus, NGOs and commercial actors become involved. Currently, there are many PMSCs that are involved in SSR work in Africa. Although actual data is hard to obtain, the involvement of PMSCs in SSR efforts is generally increasing.¹³² PMSCs work in three main areas: training (including military and police), management support and diagnostics, and policy review.¹³³ PMSCs that work in the field of SSR are funded in three major ways: through governmental contracts where the African state directly hires the services of the company, by transnational companies, such as was the case in Nigeria where Shell provided funds to support the training of police,

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¹²⁹ See Olaniyan, Unorthodox peacekeeping responses in Africa, in S Gumedze eds., *From Market for Force to Market for Peace: Private Military & Security Companies in Peacekeeping Operations*, ISS Monograph 183 (2011), 5.

¹³⁰ Haggi, Conceptualising security sector reform in A Bryden & H Haggi eds., *Reform and Reconstruction of the Security Sector* (2004). See also OECD definition: "... to increase partner countries' ability to meet the range of security needs within their societies in a manner consistent with democratic norms and sound principles of governance, transparency and the rule of law. SSR includes, but extends well beyond, the narrower focus of more traditional security assistance on defence, intelligence and policing" OECD Development Cooperation Directorate 2005, *Security System Reform and Governance*, URL <http://www.oecd.org/dataoecd/8/39/31785288.pdf>, p. 1.

¹³¹ See Schulz and Yeung, *Private Military and Security Companies and Gender*, Gender & SSR Toolkit No 10 (2008) 1, available at www.dcaf.ch/content/download/35477/526171/file/tool_10.pdf.

¹³² Mendel, *Armies Without States: The Privatisation of Security* (2002), 56.

¹³³ Schulz and Yeung *supra note* 20 at 1.

and by donor countries such as the US.¹³⁴ PMSCs such as MPRI, DynCorp, Northrop, Grupmann, Pacific Architects and Engineers have all provided SSR services in Angola, Nigeria, Equatorial Guinea, Rwanda and Malawi. As already mentioned, PMSCs are also involved in continental security initiatives such as the Africa Crisis Response Initiative (ACRI), Africa Contingency Operation and Training Assistance (ACOTA) and also the US department of State AFRICAP program, all of which have been supported by the US government.¹³⁵

3. Use of PMSCs in maritime security

Piracy in the horn of Africa has been a major problem since 2008. Reports suggest that about 800 ships have been attacked, 170 vessels hijacked and more than 3400 seafarers taken hostages.¹³⁶ Due to the vast geographical scope of the problem, national militaries are often unable to cope with this menace. PMSCs have been contracted to provide protection for ships in the area. Control Risk Group and G4S have provided safe passage services to ships. Flag Victor, a UK company, now provides an on-line market place where ships can meet PMSCs and hire their services.¹³⁷ The use of PMSCs services in counter-piracy response has raised concerns which now call for the regulation of such companies. Most crucial is the fact that PMSC personnel that guard ships carry lethal weapons which may be transported across jurisdictions. This creates the problem of determining that should be responsible for regulating or licensing the use of these weapons. There is a risk that armed guards aboard ships may detain and even engage in active fire exchanges which violate human rights. There are fears that active use of weapons could result in civilian casualties.¹³⁸

Undoubtedly, oversight mechanisms for maritime PMSCs are needed. In 2011 the Safety Committee of the International Maritime Organization (IMO) made recommendations for the regulation of PMSCs that affirmed the role of the flag state in developing appropriate legal frameworks.¹³⁹ Key issues such as the use of arms were therefore left to individual states to decide. In 2012, the same committee

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¹³⁴ See Avant, *The Market Force: the Consequences of Privatising Security* (2005), 124–125.

¹³⁵ See Olaniyan *supra note* 18 at 9.

¹³⁶ See Black, *Piracy a major drain for world economy*, *The National Business*, 13 May 2012, available at <http://www.thenational.ae/business/industry-insights/economics/piracy-a-major-drain-for-world-economy>.

¹³⁷ See Safety4Sea, *Launch of Flag Victor: helping ship owners to better source and manage their security requirements*, available at <http://www.safety4sea.com/launch-of-flag-victor:-helping-ship-owners-to-better-source-and-manage-their-sec-9847>.

¹³⁸ See Coito, *Pirates vs Private Security: Commercial shipping, Montreux Document and the battle of Gulf of Aden* (2013) 101(1) *Cal L Rev* 173, 182.

¹³⁹ See Liss, *Regulating Private Military and Security Companies at sea: New developments and Challenges*, Institute for near East & Gulf Military Analysis (2012), 3, available at <http://www.counterpiracy.ae/upload/Briefing/Carolin%20Liss-Essay-Eng-2.pdf>.

developed an interim guidance on PMSCs.¹⁴⁰ Apart from setting out general rules on management, vetting processes, training of personnel and deployment of PMSCs, the Committee also recommended that International Organisation for Standardization (ISO) standards be applied to PMSCs. Obviously, this will impact the licensing of PMSCs and its success will depend on the structure of the regulatory frameworks that individual states put in place.¹⁴¹ Apart from the IMO processes, the key actors in the maritime industry such as BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF, and IGP&I Club, have developed industry guidelines on the use of PMSC counter-piracy services that could complement the Montreux Document and the International Code of Conduct.¹⁴² It should be noted however that there is no consensus yet on the use of arms by maritime PMSCs as this depends on the laws of flag states.

4. Guard services

PMSCs have provided guard services to companies and other entities operating in conflict areas, complex environments, and also during peacetime. PMSCs are often used by extractive companies in guarding mine sites and other infrastructure. Angola, for example, has a history of use of PMSCs in guarding oil resources, especially during the civil war (1975–2002).¹⁴³ In 1992, Gulf Chevron and Pentragoil contracted Executive Outcomes to guard their oil fields at Soyo.¹⁴⁴ Airscan provided security for Gulf Oils’s Cabinda oilfields, while International Defence and Security protected the Cuango diamonds.¹⁴⁵ British PMSCs such as KMS, Gurkha Security Guards, Saladdin, Amor Group Hart, Olive provide guard services in many resource rich areas in countries such as Sierra Leone and even Kenya.¹⁴⁶ International organisations such as the World Bank, UN, and humanitarian NGOs have used the guard services of PMSCs. Particularly notable is the fact that PMSCs have been used to protect humanitarian workers and equipment. For example, DSL has worked for UN organisations including UNICEF and WFP to guard their personnel and property.¹⁴⁷

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¹⁴⁰ See IMO, Guidelines for Private Maritime Security Companies Agreed by IMO’s Maritime Safety Committee, May 2012, available at <http://www.imo.org/en/MediaCentre/PressBriefings/Pages/17-msc-90-piracy.aspx#VccgMHGqHw>.

¹⁴¹ *Ibid.*

¹⁴² See Oceans Beyond Piracy, Introduction to Private Maritime Security Companies (PMSC), available at http://oceansbeyondpiracy.org/sites/default/files/pmsc_map_final_6.pdf.

¹⁴³ See generally Dietrich, Inventory of informal diamond mining in Angola, in Cilliers & Dietrich eds., *Angola’s War Economy: The Role of Oil and Diamonds* (2000).

¹⁴⁴ *Ibid* at 11.

¹⁴⁵ See Reno, The real (war) economy of Angola, in Cilliers & Dietrich eds., *Angola’s War Economy: The Role of Oil and Diamonds* (2000), 227.

¹⁴⁶ See Lilly, Privatisation of peacekeeping: Prospects and realities, in *Peacekeeping: Evolution or Extinction?* United Nations Institute for Disarmament Research (1999), 57; Noor *et al*, Does private security mean better security for Kenya, ISS Today, June 2015, available at <https://www.issafrika.org/iss-today/does-private-security-mean-better-security-in-kenya>.

¹⁴⁷ See Lilly, *Ibid* at 55.

B. Need for regulation: Challenges in oversight of PMSCs

This section discusses the common challenges that the region faces with a view to identifying why regulations are necessary. The expansion of the private security industry in Sub-Saharan Africa has not been matched by up to-date regulatory measures. There are many aspects of the operations of the PMSC industry that are not regulated by the mainstream legal regimes in individual countries. Given that the growth of industry largely results from the serious security challenges that these countries face, it is ultimately in their interest that appropriate legal and policy infrastructure is developed to ensure that security sector supports the establishment of the rule of law and proper governance. Given the myriad services that PMSCs offer, unregulated operations create a risk of human rights violations and, in armed conflict, IHL violations, and other forms of criminal behaviour. Indeed, this has been the case in places such as Iraq and Afghanistan where incidents of human rights violations and IHL violations have been reported.¹⁴⁸

1. Lack of a common definition of “PMSCs” in national legislation

Many PMSCs in Africa work in situations of armed conflict, indicating that the rule of law may be weakened. As Jackson has observed, there is diversity and multiplicity of military and non-military actors in these situations, including “government military formations, rebels, insurgents, private militias, warlords criminal gangs, mercenaries and private security providers, multinational corporations, and even peacekeepers.”¹⁴⁹ There is a need for a clear understanding of their roles and how their operations fall within the ambit of the law. Currently, international and regional legal regimes focus on the offence of mercenarism and it quite clear that there is a need for specific legislation that applies to modern PMSCs. In view of this, PMSCs must first be defined. This will provide a basis for designing appropriate regulatory regimes. Leander summarises as follows:

How to hold firms and their employees accountable, how to keep states accountable, how to ensure that command hierarchies and the responsibilities are clear in the armed forces, and how to create the administrative structures necessary to manage the blurring between private/public line.¹⁵⁰

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¹⁴⁸ Examples include the human rights abuses in Abhu Ghraib prison in Iraq (See Amann, ‘Abu Gharib’ (2005) 153(6) *University of Pennsylvania L Rev* 2085-2141) and the incident involving Blackwater (re-named Xe) personnel who in September 2007 fired at a civilian car in the streets of Baghdad and killed all its occupants. See Raghavan, and White, ‘Blackwater Guards Fired at Fleeing Cars, Soldiers Say’ *Washington Post*, 12 October, 2007; Tavernise, and Glanz, ‘Iraq Report Says Blackwater Guards Fired First’ *New York Times*; Fainaru. Where Military Rules Don’t Apply: Blackwater’s Security Force in Iraq Given Wide latitude by State Department’ *Washington Post*, 20 Sept. 2007.

¹⁴⁹ See Jackson, Africa’s wars: Overview causes and the challenges of conflict transformation in F Furley and R May eds., *Ending Africa’s wars: Progressing to Peace* (2006) 19.

¹⁵⁰ A Leander ‘The Power to Construct International Security: On Significance of Private Military Companies’ (2005) 33 (3) *Millennium-Journal of International Studies* 803–825.

The current legislative and normative frameworks that regulate the security industry at the international level are insufficient in regulating modern PMSCs because they are either based on the old ideology of mercenarism or they address the internal security sector and companies that primarily provide limited domestic guard services. The role of the state in this respect has not receded, as governments are ultimately key players in the regulation of PMSCs. It is apparent that PMSCs and mercenaries are two distinct entities; Africans must begin to view these two entities in that light. This means that an acceptable definition of PMSCs that recognises these differences must be adopted and codified into law. At the same time, although some PMSCs are primarily domestically based, many companies operate transnationally and therefore deserve unique attention under national law.

It is proposed here that African states should consider adopting the definition of PMSCs as given in the Montreux Document because it provides a suitable template for designing a regulatory framework. According to the Document, PMSCs are “private business entities that provide military and /or security services, irrespective of how they describe themselves.”¹⁵¹ The Document adopts a functional approach which describes the kinds of activities that PMSCs may be involved in. This departs from the classification approach mentioned earlier, which was based on their proximity to, or involvement in combat operations.¹⁵² It further defines PMSC personnel as “persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers”. Obviously, this narrows down the category of persons that may incur responsibility on behalf of the PMSC and recognises the element of “subcontracting” that is prevalent in the private security industry today.¹⁵³

2. Links to extractive industry

There has been concern in the region that the involvement of PMSCs in the extractive industry facilitates economic exploitation.¹⁵⁴ This is particularly worrisome when PMSCs are paid from mineral resources – a factor that often helps to prolong conflicts.¹⁵⁵ The defunct Executive Outcomes was paid through a grant of mineral concessions during the Sierra Leone civil war. The fact that there may be weak legal

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¹⁵¹ See Montreux Document, 2008, page 9, para 9. Note that military and security services are further defined to include “armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel”.

¹⁵² See Cockayne J “Regulating Private Military and Security Companies: The Content, Negotiation, Weakness and Promise of the Montreux Document” (2009) 13(3) *Journal of Conflict & Security Law* 401, 406.

¹⁵³ Para 31 of the document deals with subcontracting and recommends as a good practice that states ensure that PMSCs notify the state of any subcontracting; that they demonstrate that subcontractors have authorisation; and that the principal PMSC is liable for the conduct of the subcontractor.

¹⁵⁴ See Gumedze, Regulatory approaches (if any) to private military and security companies in Africa in Gumedze eds. *Merchants of African Conflicts* (2011) 46.

¹⁵⁵ *Ibid.*

systems and laws that protect access and exploitation of mineral resources often aggravates the situation. A regional framework may be needed in this regard to support weak states that are unable to safeguard their natural resources. Such a framework will place obligations on states in the region to ensure that they stop transactions on illicit minerals and forbid PMSCs involved in such exploitation from operating in their territories.

3. Transnational character of PMSCs

The transnational nature of PMSCs poses a problem since PMSCs working in Africa are mostly foreign-based. Foreign-based PMSCs also hire third country nationals. This has implications on the applicability of state legislation. When PMSC personnel commit crimes, it is often difficult to determine the legal jurisdiction. If the crime is not committed within the territory of the Home state, it is often more difficult for the state to prosecute, unless it has laws that apply extraterritorial jurisdiction. Due to Africa's porous borders, there is a need for a more concerted effort to regulate transnational operations.

Secondly, PMSCs operations often spread across borders, in terms of contracts performance, organizational base, and even recruiting of personnel. Although a company may be based in US, its main work may be in another state with personnel drawn from all over the world. This suggests that monitoring or oversight authorities should not only have extraterritorial jurisdiction, but be capable of collecting evidence from activities that may not be within their borders. Poorer states, such as those in Africa, are unlikely to enforce any regulatory measures that require extensive resources. Territorial states (in which PMSCs operate) are experiencing high levels of insecurity and do not have strong enforcement mechanisms. These reasons perhaps explain why few territorial states are enacting legislation to regulate PMSCs carrying out business in their territories.

4. Unavailability of data and lack of transparency

The information about the size and operations of the PMSC industry in Africa is very limited. This is partly due to very limited research being done in the region.¹⁵⁶ A recent study by Private Security Industry Regulatory Authority of South Africa (PSIRA) has shown that in almost all southern African countries, there is no accurate data on the number of private security operators. Shortcomings in the availability of information are also a consequence of the lack of transparency within the industry. This arises in a number of ways. When PMSCs operate in conflict situations and are

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¹⁵⁶ See Gumedze, Regulatory approaches (if any) to private military and security companies in Africa: Regional mapping study in S Gumedze eds., *Merchants of African Conflicts: More than a Pound of Flesh* (2011) 41.

contracted by parties to the conflict, this poses a conflict of interest that could have an implication on the respect of human rights. Often it is difficult to differentiate PMSCs' support for peace missions from their pursuit of interests consistent with their allegiance to the agencies that contract them. Thus, the use of PMSCs in the region and especially in conflict areas has always been problematic because of the issues of accountability. One commentator has observed:

Lack of transparency, democratic oversight and accountability inevitably lead to a decreased perception of legitimacy on the part of these actors in the eyes of local governments and civilian populations. Increasingly, civilian populations perceive PMSCs as showing disdain for human rights, operating outside the framework of the rule of law and without accountability to the state in which they operate or regulation by the state in which the company originates (predominately the United Kingdom and United States).¹⁵⁷

In other cases, entities that hire the services of PMSCs are less transparent with regards to their contracting policies. In this situation, it is difficult to determine the level of oversight of PMSCs. National militaries are indeed accountable to the electorate, PMSCs, on the other hand, have no form of explicit political accountability even when they perform inherently political functions. Although, states have an obligation to protect and fulfil human rights law and an obligation to ensure respect for IHL, this is indeed a problem. Most PMSCs have at their disposal sophisticated military equipment, perhaps even more sophisticated than what most African states have. The fact that many PMSCs are not under the same constraints as government forces is a source of great concern. Moreover, when PMSCs outsource to sub-contractors, this complicates the matter even further. Use of subcontractors blurs the transparency of the internal processes of companies. PMSCs thus often have to report to two masters, the employer and the Territorial state. Thus PMSCs may be agents of unwanted change. They may be interested in doing what the donor wants at the expense of what is useful for the country where they work.

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¹⁵⁷ Zedeck, Private military/security companies, human security and state building in Africa, *African Security Review* 16(4) (2008), 99.

III.

Structure of Existing Regulatory Frameworks

The argument that transgressions by PMSCs could be addressed by stricter normative regimes is hardly contested, neither has it been overshadowed by the exponential growth of the industry. The question though, is what kind of regulatory frameworks should there be, and at which levels? And even if such frameworks were to be established, which institutions should have custody over them?

A. International and regional regulatory frameworks

It may be useful to begin the discussion here by sketching the general landscape of regulatory frameworks that currently exist. The regulations applicable to PMSC activities fall into three categories. The first are sets of laws that fit into the general category of international law. These include the binding international treaties specific to mercenary activity, international humanitarian law treaties, the general principles of international law including human rights law, and rules of customary international law. The First Additional Protocol to the Geneva Conventions 1949. The most recent UN treaty is the International Convention against the Recruitment, Use, Financing and Training of Mercenaries which came into force on 20 October 2001. Apart from providing a relatively expansive definition of what a mercenary is, the convention prohibits recruitment, use and financing of mercenary activity by member states “for the purpose of “opposing legitimate exercise of the inalienable right of peoples to self-determination, as recognised by international law.”¹⁵⁸ General principles of international law that affect PMSCs are many and may be contained in soft law instruments. One example is the Articles on Responsibility of States for Internationally Wrongful Acts (2001) which lays down the principle that states are liable for wrongful acts that can be attributed to them. Thus, when PMSCs act as organs of state their actions are attributed to states that contract them.

With respect to continental or regional regulatory frameworks in the African region, this set of laws comprises the basic text of the OAU/AU Convention for the Elimination of Mercenarism in Africa¹⁵⁹ and the Luanda Conventions. The OAU/AU Convention codifies the criminality of mercenarism and places the responsibility of prosecuting offenders on member states. Under Article 6 of the convention,

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¹⁵⁸ Art 2.

¹⁵⁹ Adopted 3 July 1977 and came into force 22 April 1985.

states are required to forbid the recruitment, training, financing, procurement of equipment, or any other activity related to mercenarism being conducted in their territory. The convention also calls for cooperation amongst states in dealing with offenders. Article 10 requires that states offer each other “the greatest measure of assistance in connection with the investigation and criminal proceedings brought in respect of the offence.” The Convention has been ratified by 30 African states.¹⁶⁰ Despite ratification most African states have not applied the Convention to domestic contexts.

These existing international and regional legal frameworks that target mercenaries in most instances are not applicable to PMSCs, leaving a gap in regulatory frameworks for PMSCs. Although PMSCs do not operate in a legal vacuum, the realisation that national frameworks are often inadequate has led to some very key developments at the international level, especially within the UN. It should be noted that up until the 1980s, there was little effort to move away from the narrow focus on ‘mercenaries’ that had characterised normative approaches to privatised security in the last century. However, in the latter half of the decade, the UN subtly acknowledged the change in the private security landscape and thus appointed a Special Rapporteur on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of Rights of Peoples to Self-determination, to investigate the status of the phenomenon and maybe, provide insights on the ways forward. In 2005, the Special Rapporteur was replaced by the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination (hereinafter the ‘Working Group on Mercenaries’). In 2008, the UN made a more direct assertion of the need for regulation of the PMSC activity. In resolution 62/145, the Assembly called on member states to ban any companies that intervene in armed conflicts or engage in any activity that might destabilise constitutional regimes. It also encouraged states that engage the services of PMSCs to, “establish regulatory national mechanisms for their registering and licensing of those companies in order to ensure that imported services provided by those companies neither impede the enjoyment of human rights nor violate human rights in the recipient country.” To this end, the Working Group on Mercenaries has made efforts, in collaboration with other initiatives, to establish universally acceptable regulatory standards. The Working Group on Mercenaries works alongside the Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies (hereinafter the ‘Intergovernmental Working Group’). The Intergovernmental Working Group was established as a Special Procedure by the Human Rights Council in October 2010.

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¹⁶⁰ See AU, Report on the Status of OAU/AU Treaties, Ex.CL/728(XXI) Rev 1 (2012) page 10.

The Group was tasked to consider “the possibility of elaborating an international regulatory framework, including, inter alia, the option of elaborating a legally binding instrument on the regulation, monitoring and oversight of the activities of private military and security companies, including their accountability.”¹⁶¹ Other initiatives are the Montreux Document, which is the subject of the later discussion in this study, and the International Code of Conduct for Private Security Providers.

B. Domestic regulatory frameworks

This section will examine the efforts that have been made towards establishing regulatory mechanisms through domestic legislation. The section focuses on the various national laws that either address mercenaries exclusively or create regulatory frameworks for privatised military industry in general. The section examines the Republic of South Africa and Sierra Leone as case studies for the purposes of this study.

1. South Africa

Upon overthrow of the apartheid regime in 1994, the new South African government found itself in a unique position with regards to continental security. First, the government was faced with the question of former military personnel being recruited by PMSCs. Secondly, it sought to reassert itself as the continental leader. Both instances necessitated that it urgently reformed its security sector. Several pieces of legislation were thus enacted that had implications for private security personnel. This legislation is of two kinds. The first responded to the regional disdain against mercenaries as embodied in the OAU/AU Convention on Mercenarism. These laws have a prohibitionist approach similar to that of the Convention. They outlaw participation by South African citizens in any form of private military work outside the country and especially in conflict zones. The second regulates local private security companies and some aspects of their work such as the use of arms and ammunition. These laws are similar to the ones that you will find in other countries such as Gambia, Uganda, and Nigeria.

*(a) Regulation of Foreign Military Assistance Act (FMA) (1998)*¹⁶²

The aim of this legislation was twofold: to ban mercenarism and regulate the provision of military assistance outside South Africa. The Act required that any person intending to offer services of a military nature must obtain authorisation from government. The services include advice training, personnel, logistics, finance, operation, recruitment, procurement of equipment, and “any other action that has

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¹⁶¹ Human Rights Council Res 15/26.

¹⁶² Act No 15 of 1998.

the result of furthering the military interest of a party to the conflict.” There were difficulties in enforcing the Act and as a result the government sought to replace it with the *Prohibition of Mercenary Activities and Regulations of Certain Activities in Countries of Armed Conflict Act* discussed below.¹⁶³ However, since this new Act has not come into force, because the necessary regulation that need to be put in place for it to effectively repeal FMA have not been promulgated, FMA still applies.

(b) *Prohibition of Mercenary Activities and Regulations of Certain Activities in Countries of Armed Conflict Act (2007)*

This Act was meant to repeal the FMA discussed above and was signed into law by President Thabo Mbeki in November 2007. It embodies what we characterise as South Africa’s prohibitionist approach to private security. Among other objectives, this Act seeks to “prohibit mercenary activity; to regulate the provision of assistance or service of a military or military-related nature in a country of armed conflict; to regulate the enlistment of South African citizens or permanent residents in other armed forces; to regulate the provision of humanitarian aid in a country of armed conflict; to provide for extra-territorial jurisdiction for the courts of the Republic with regard to certain offences; to provide for offences and penalties.”¹⁶⁴

From these objectives, the Act constructs a two-pronged prohibitionist framework. First, it criminalises all acts that are deemed mercenary in nature.¹⁶⁵ These acts include the direct or indirect recruitment, use, training or support of combatants in armed conflicts. In furtherance of its prohibitionist posture, the Act adopts some of the elements of the definition of a mercenary found in regional and international instruments such as the object of private gain; the participation, directly or indirectly in acts aimed at furthering armed conflicts; instigating or supporting rebellion against legitimate governments, coup d’état and the undermining of constitutional order, sovereignty and territorial integrity of states. Secondly, the Act seeks to exercise control over persons or companies or individuals that may legitimately engage in such activities abroad by establishing a licensing process. Thus, a major aspect of this Act is the requirement for the registration of PMSCs by the National Conventional Arms Control Committee established under the National Conventional Arms Control Act.¹⁶⁶

In addition to these, the Act has extraterritorial application. It regulates the activities of South African registered PMSCs in foreign lands. For example, sections 3, 4, and 5 of the Act prohibit the rendering of assistance and certain services, the enlistment

¹⁶³ See Bosch and Maritz, South Africa’s private security contractors active in armed conflicts: Citizenship, prosecution and the right to work (2011) 14(7) *Potchefstroom L J* 71 at 75.

¹⁶⁴ See Mercenary Act, the preamble.

¹⁶⁵ *Ibid.* s 2.

¹⁶⁶ Act 41of 2002.

of South Africans in armed forces other than South African Defence Force, and the provision of humanitarian services in countries where there is an armed conflict or regulated country. Persons seeking to perform or participate in such acts may apply for authorisation through a procedure set out in section 7.

(c) *Private Security Industry Regulation Act (2001)*

This legislation responded to the need to establish a mechanism for regulating domestic providers of security services in line with the security sector reform process that began after 1994, as well as the exponential growth of the industry.¹⁶⁷ The Act applies to all companies that offer security services. It defines 'security services' most extensively to include services such as: protecting or safeguarding a person or property in any manner; giving advice on the protection or safeguarding of a person or property, on any other type of security service as defined on the use of security equipment; manufacturing, importing, distributing or advertising or monitoring devices; performing the functions of a private investigator; providing security training or instruction to a security service provider or prospective security service provider; installing, servicing or repairing security equipment; and even monitoring signals or transmissions from electronic security equipment. There are many PMSCs that offer these kinds of services and are therefore subject to the Act's regulatory regime. The Act also establishes a licensing and monitoring framework that is overseen by the Private Security Industry Regulatory Authority (PSIRA). This body (PSIRA) considers all applications for licenses and employs inspectors who are responsible for monitoring compliance with the Act.

Like most domestic security legislation that affects PMSCs, this Act does not have an explicit mandate to regulate operations outside the Republic of South Africa. One could argue that activities of PMSCs that are conducted outside the country may become subject to local legislation only when they are criminal in nature. But even in this situation, the crime must be of a nature that is covered by legislation such as the Rome Statute of the International Criminal Court Act which establishes universal jurisdiction for domestic courts over certain crimes. Another issue worth noting is that recently, a controversial amendment has been introduced to the Private Security Industry Regulation Act which will limit the control of private security companies by foreign persons to less than fifty percent. This means that companies will only be licensed if the majority shareholders are South Africans. The new amendment also extends the application of the International Code of Conduct to all security companies whether registered by Act or not.¹⁶⁸

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¹⁶⁷ See White Paper on Safety and Security, 'In Service of Safety,' 1999–2004, September 1998, Department of Safety and Security, (the name of the Ministry for Safety and Security was changed to Ministry of Police).

¹⁶⁸ S 27(2). The Amendment is yet to be signed by the President.

2. Sierra Leone

Sierra Leone is a society in transition, having experienced a devastating civil war in which a number of PMSCs were involved. After the war, part of the challenge for creating political stability and ensuring lasting peace has been eliminating insecurity. A priority was thus given to security sector reforms. However, the success of the reforms in the post-conflict phase was always seen as contingent on harnessing the operations of both public and private security forces and establishing a suitable regulatory framework for the industry. Thus, regulation of the private security sector must be viewed in the context of the history of an armed conflict, the collapsed public security infrastructure, the ensuing distrust among the populations of the public security apparatus, and the inordinately high number of foreign security firms in the country.¹⁶⁹ Thus far, the regulatory framework that has been established is based on two main instruments – the *National Security and Central Intelligence Act* and the *Standard Operating Manual for Private Security Companies (SOP)*. These two instruments have responded to the national circumstances and must be understood in that light.

(a) *National Security and Central Intelligence Act*¹⁷⁰

This Act was passed in 2002. It is the key legislation that establishes the framework for regulation of PMSCs in Sierra Leone. It is meant to provide for the “internal and external security of Sierra Leone”¹⁷¹ by providing “the highest forum for the consideration and determination of matters relating to the security of Sierra Leone.”¹⁷² The Act establishes the National Security Council.¹⁷³ The Council has a very wide mandate which includes the safeguarding of the internal and external security of the state, gathering of information relating to the security of the state and monitoring external military support that the state gets.¹⁷⁴ The Act created the Office of National Security (ONS) which is the pivotal organ for regulation of all private security operatives. ONS is the secretariat to the National Security Council established under section 3 of the Act. The Act prohibits the operation of a private security company unless a person obtains a license to do so.¹⁷⁵ It mandates the

¹⁶⁹ See Abrahamsen and William, *Globalisation of Private Security: Country Report – Sierra Leone*, University of Wales, Aberystwyth (2005), available at: <http://users.aber.ac.uk/rbh/privatesecurity/country%20report-sierra%20leone.pdf>.

¹⁷⁰ Act No 10 of 2002.

¹⁷¹ See Status Report on Anglophone Africa: Comprehensive Study and Analysis of National Legislations, page 12.

¹⁷² S 4(1) of the Act.

¹⁷³ Other bodies that the Act establishes are the National Security Council (NSC) which is chaired by the President), and consist of, among others, the Ministers of Finance, Foreign Affairs, Internal Affairs, Information and Broadcasting, State for Presidential Affairs, Inspector General of Sierra Leone Police (SLP), and Chief of Defence Staff of the Republic of Sierra Leone Armed Force (RSLAF). See Conteh 2008 “Security Sector Reform in Sierra Leone” 9.

¹⁷⁴ s 4 (2) of the Act.

¹⁷⁵ S 19(2) of the Act.

ONS to oversee the licensing and monitoring of all private security companies that operate within the borders of Sierra Leone.

The Act defines security services as ‘services connected with the security of the state as Council may determine’, which brings the PMSCs under the ambit of the Act. “Private Security Company” is also defined as “a company providing security services to persons, homes, business or institution, whether private or public.”¹⁷⁶ Thus, ONS licenses all PMSCs in accordance with set regulations, and ensures that PMSCs comply with the Standard Operating Manual for Private Security Companies (SOP). Some of the guidelines that the ONS must consider include adequacy of resources, the validity of the modes of acquisition of arms and ammunition that the company intends to use in its operations. It also considers the fitness of character of the persons behind the company and public interest.

(b) Standard Operating Manual for private Security Companies (SOP)

The Manual was compiled by the Office of National Security in 2005 after consultations with all stake holders. Its promulgation was widely viewed as part of the government’s effort to ensure “efficiency, uniformity and compliance” in the regulation of the private security industry.¹⁷⁷ Its aim was to “equip private security companies with useful, relevant, and informed knowledge, skills, and capacity to undertake the important task of effective and efficient operation and management within the framework of National Security”. As already mentioned, the Manual contains both the guidelines that must be fulfilled before licenses can be issued and those that relate to conduct of business. Some of the guidelines include minimum wage requirements for personnel, ownership of sufficient and up to date equipment, the training of personnel in international humanitarian law, human and civil rights, and gender based violence (SOP.5). In addition, there are guidelines on complaint procedures, especially those that are labour related. The manual also sets out the procedure for making application for licenses, and in this regard it becomes a useful complement to the *National Security and Central Intelligence Act*. For example, it has detailed list of the documents that should be supplied to ONS at the time that the application for a license is made (SOP. 1.2.2).

3. Limitations of domestic laws

In the first place, states face a great challenge in applying public norms to private business relationships. However, in a constitutional democracy such as South Africa, this difficulty is ameliorated by the Bill of Rights which requires that the state should

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¹⁷⁶ *Ibid* s 19(a).

¹⁷⁷ See Standard Operating Manual for Private Security Companies in Sierra Leone, available at, http://psm.du.edu/media/documents/national_regulations/countries/africa/sierra_leone/sierra_leone_standard_operating_manual_for_psc_2012.pdf

guarantee the protection of rights and ensure that companies do not violate rights of citizens. The second challenge relates to the nature of PMSCs. Most of them have offshore activities that technically fall outside the jurisdiction of home national legal systems. PMSCs operations often spread across borders, in terms of contracts performance, organizational base, and even recruiting of personnel. Although a company may be based in US, its main work may be in Iraq with personnel drawn from all over the world. This suggests that monitoring or oversight authorities should not only have extra-territorial jurisdiction, but be capable of collecting evidence from activities that may not be within their borders.

Fourthly, it is clear that domestic legislation rarely makes reference to international human rights instruments or explicitly seeks to enforce international standards. Legislation often does not include nuances of protection mandated by international humanitarian law or international human rights, other than setting out the general alignment with the national constitution. In practice, the absence of such references often limits the application of those laws to domestic situations. It would be useful for states to consider linking their frameworks to regional and international law and their institutions.

Lastly, there is the question of resources to implement the demands of a regulatory regime that may be needed for PMSCs. While the legislation may set out an elaborate and very strict framework for regulation, the implementation may be difficult. Thus, poorer states in Africa are unlikely to enforce any regulatory measures that require extensive resources. In addition, states in which PMSCs operate are those experiencing some form of strife or just coming out of one. Implementation of any regulatory framework will often depend on external support because the state may still need to consolidate its governance and economic structures. Countries that are experiencing high levels of insecurity may not be able, in the short term, to put in place strong enforcement mechanisms unless externally funded. Another factor worthy of consideration is that domestic legislation does not make any reference to military services and yet there are many PMSCs in the African region that operate in war zones. Except for South Africa's Prohibition of Mercenary Activities and Regulations of Certain Activities in Countries of Armed Conflict Act almost all domestic laws are silent on this fact. These reasons may also explain why not many poorer nations are enacting any legislation meant to regulate PMSCs resident or operating in their territories.

IV.

The Montreux Document

The processes that led to the promulgation and signing of the Montreux Document are documented in many studies and we do not need to repeat the same here.¹⁷⁸ The Montreux Document is an intergovernmental document (which is the fruit of a joint initiative between Switzerland and the ICRC) and is not a binding instrument but rather a gathering of pertinent international law and a proposition of recommendations geared towards assisting states implement their existing legal obligations in regulating PMSCs. It proposes a regulatory framework for PMSCs that is based on “contracts, codes of conduct, national legislation regional instruments and international standards.”¹⁷⁹ The Montreux Document gives expression to the consensus that international law does apply to PMSCs and there is not a legal vacuum concerning their activities. Although the document is open for states to endorse, it does not legally commit them to any of the frameworks that it proposes for regulation of PMSCs. However, it does not in any way alter the obligations that states already have under international law. At the time of writing, the Montreux Document is supported by fifty-two states and three international organisations, namely, the European Union, the Organisation for Security and Cooperation in Europe and the North Atlantic Treaty Organisation.¹⁸⁰

A. Regulatory approach

The Document has two parts. The first part gathers 27 obligations aimed to dispel the misconception that PMSCs operate in a legal vacuum. These obligations are derived from the existing international instruments and the general principles of customary international law, and span the fields of international humanitarian law, human rights law, and international criminal law. For purposes of delineating these responsibilities, the Document addresses four categories of states: ‘Contracting states’ (countries who hire PMSCs), ‘Territorial states’ (countries on whose territory PMSCs operate), ‘Home states’ (countries in which PMSCs are based), and ‘all other
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¹⁷⁸ This document was produced by a joint effort of seventeen countries: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States of America. Also, PMSC industry and the NGO community were represented. The text is available at http://www.un.org/ga/search/view_doc.asp?symbol=A/63/467 (Accessed 23 May, 2009).

¹⁷⁹ See Cockyane *supra* note 41 at 402.

¹⁸⁰ For a full list of participants, see www.mdforum.ch/participants

states'. These obligations generally require that states ensure PMSCs' compliance with international law. The Montreux Document affirms the primacy of the state in regulating PMSCs. The Document states that the responsibility of contracting states for violations of IHL or human rights law by PMSCs or their personnel will arise where the PMSC is incorporated in the regular armed forces; where members of organised armed forces, groups or units are under the command of the state; if empowered to exercise elements of governmental Authority if acting in that capacity (i.e. are formally authorised by law or regulation to perform functions 'normally' conducted by organs of state); and where the PMSC is in fact acting under the instructions of the state or under its direction or control.¹⁸¹ This borrows from the international law of state responsibility outlined in the *Articles on Responsibility of States for Internationally Wrongful Acts*.¹⁸² The implication of this responsibility as far as PMSCs are concerned is that while it might be possible to outsource services, states will however not be able to outsource responsibilities. It is noteworthy that state responsibility is a doctrine that is rarely invoked. Although the Montreux Document contains already existing international obligations that must be implemented, states with weaker legislation or those who delay in enacting appropriate laws may not be able to succeed in fully participating in the framework created by the Document. A result may be that PMSCs will move to such states to avoid strict oversight. As we have indicated already, states may have interest in shielding PMSCs who perform sensitive functions from public oversight. They may be tempted to enact laws that give immunity or restrict disclosure of information to the public. Thus, leaving regulatory functions entirely in their hands may not solve much of the problems with the PMSC industry. In this regard, the Document should have given further recognition to civil society, especially in the monitoring of accountability of PMSCs in conflict situations.

The Document also places responsibility on PMSC personnel. They are obligated, "regardless of their status, to comply with applicable international humanitarian law." It provides that the status of PMSC personnel be determined by IHL on a case by case basis and in accordance with "nature and circumstances of the functions in which they are involved."¹⁸³ It also recommends that "Contracting states take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities." Thus, the likelihood of a particular activity causing personnel to participate directly in hostilities should be considered when placing limits on PMSC activities. Secondly, PMSC personnel are

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¹⁸¹ Para 7 of Part 1 of the Document spells out this obligation in rather elaborate terms.

¹⁸² See International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, adopted at 53rd Sess. November 2001, articles 5, 8 and 9. See also, Military and Paramilitary Activities in and Against Nicaragua for the 'effective control test' under international law.

¹⁸³ See Montreux Document, para 24.

subject to the law of territorial state. This means that regardless of their nationality, PMSC personnel are expected to obey the full range of domestic laws of the country where they are working. This does not change much, only that it has implications if read together with other rules in the Document, such as the requirement for cooperation among states in their investigation, extradition and surrender of persons suspected of having committed crimes under international law.

The second part of the Document contains a list of Good Practices. Like the obligations aforementioned, these recommendations are meant to “provide guidance and assistance to states in ensuring respect for international humanitarian law and human rights law” and to promote responsible conduct in states’ relationship with PMSCs operating in their territories. This part draws from existing practises and international instruments and contains 73 Good Practices, setting procedures and criteria for the selection of PMSCs; basic terms of contracts; the criteria and procedure of authorisations to provide military and security services; terms of such authorisation; rules for provision of services; and procedures for monitoring compliance and ensuring accountability.

B. Applying the Montreux Document in the region

There are several reasons why the Montreux Document may provide a useful tool for regulating PMSCs operating in Africa. The first important consideration is that the document affirms the need for various levels of regulatory regimes, from the domestic to the regional. According to Cockyane, the Montreux Document “provides a set of generally respected standards on which other regulatory initiatives might be built.”¹⁸⁴ Let us begin with the domestic level. As we have already noted, almost all countries in the region have one form or another of domestic legislation. But these are ill-suited for PMSCs because of the reasons we have outlined earlier. One of these reasons is that the domestic laws have insufficient reference to international standards. The Document indicates an approach to domesticating regulatory mechanisms for PMSCs that goes beyond what exists currently. It requires that states take steps to enact legislation “necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts.”¹⁸⁵ These legislations must be in conformity with international instruments, and should establish methods of enforcement of the obligations created by such law, including investigating and prosecuting offenders; ensuring

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¹⁸⁴ Cockyane *supra* note 41 at 427.

¹⁸⁵ See para 5, 11 and 16.

respect of international law; and taking responsibility of the activity of PMSCs whom they contract, including the readiness to provide reparations whenever necessary, to parties who suffer as a result of PMSC activity. At the regional level the Document has a strong appeal for cooperation between the home state, territorial state and contracting state. For example, states are encouraged to consult one another on use of fire arms, legal status of PMSC personnel and on investigations. This presupposes that countries will establish some form of regional framework for regulation of PMSCs that complement the domestic ones. For Africa, this calls for more involvement from the AU. The continental body should consider putting in place a regime that will facilitate such cooperation and help states regulate the operations of PMSCs and should advocate for more active participation in the Montreux Document Forum, in this regard.

Given that the African Mercenary Convention has been out paced by recent developments in the security industry, it is suggested that African governments should consider enacting a new legal regime aimed at achieving three related purposes. The first would be to set common standards for the regulation of PMSCs and to outlaw illegitimate activities. Second, would be to give already existing organs both at the regional and sub-regional levels powers to promulgate regulatory measures that uphold the continental standards. Third, would be to encourage member states to enact laws that set out domestic regulatory frameworks and enforcement procedures. Member states could also be encouraged to insert limited universal jurisdiction provisions in their laws so as to create reliance on each in the enforcement of common continental and international standards.

Secondly, existing domestic laws are limited because they have no transnational reach and they do not address the military services. South Africa’s Private Security Industry Regulation Act and Sierra Leone’s National Security and Intelligence Act that we have discussed, are good examples here. The Montreux Document outlines in some considerable detail the regulatory aspects that the domestic laws as well as policy could deal with to ensure effective regulations of PMSCs. It also sets out specific regulations with regard to military services. For example, the Document invites states to establish regulatory mechanisms that are based on authorisation (licensing). The procedures are necessarily elaborate and include background checks, public disclosure, clear subcontracting rules, and even the details of the structure of the company to be supplied. These procedures have a transnational reach because local branches of companies will be required to disclose details of their parent companies and the work that they have been involved in.

This paper has presented an overview of the regulatory landscape and pinpointed areas of concern with regard to PMSC operations in the region. It has identified areas of operations for PMSCs and set out briefly some of the regulatory deficits in these areas. Overall, the paper analysed the nature and attempts that are being made, domestically, regionally and internationally to regulate PMSCs that may have effect on PMSCs that work in the region. In this regard, the South African and Sierra Leonean contexts have been used as sample studies. The unavoidable conclusion that the study here reveals is that time has come to establish an effective regulatory framework for PMSCs operating in the African continent. The basis of doing this should be the practical recognition of PMSCs as existing actors in the security arena. This recognition has become evident in the extension of PMSC services to key areas such as peacekeeping, counter-piracy response and even security sector reform in many countries in the region. The paper thus argues that an effective and legitimate regulatory framework must deal with a plethora of concerns, the most important of which are, the preliminary issue of defining these entities, determining their legal status both under international human rights law and humanitarian law, the obligations and responsibilities and the nature and implications of relationships arising between private military companies and state and non-state actors in either international or non-international armed conflict. These are matters that require normative responses that reach beyond the local and are based on keen understanding of the broader aspects of PMSCs work.

The paper urges countries in the region to acknowledge that their domestic regulatory frameworks currently in place do not fully regulate PMSC operations. Most of these laws fail to address the PMSC phenomenon, are limited to local actors and therefore lack transnational reach, and do not explicitly apply international standards. Thus, there should be some kind of legal reform that addresses the PMSC question whether in the form of amendment to the existing legislation or by enacting new laws. In addition, the paper has suggested that a regional regulatory framework should be put in place that will take into account the evolving character of the private security industry. To do this the paper has suggested that countries in the region could benefit from the Montreux Document. The Document outlines existing obligations under international law and general principles of good practice and has

set out substantive aspects of a regulatory regime, in areas such as authorisation, accountability and roles of both states and PMSCs that may lay a firm basis for a more robust regulatory framework, both at the domestic and at the regional level.



Annex III

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**The Montreux Document
in Brief**

The Montreux Document in Brief

The Montreux Document is an intergovernmental document intended to promote respect for international humanitarian law and human rights law, especially when PMSCs are present in armed conflicts. It conveniently compiles and articulates the relevant obligations under international humanitarian law and human rights law in one text. It is designed for practitioners who are confronted with the phenomenon of PMSCs especially during armed conflict.

The Montreux Document is not a new international treaty and it does not create any new legal obligations. Regardless of their support for the initiative, states are already subject to the international legal obligations contained in the Montreux Document. Most of the rules and good practices assembled in the Montreux Document derive from well-established principles of international humanitarian law and human rights law. Other branches of international law, such as the laws of state responsibility and international criminal law, also serve as a basis. The Document clarifies the misconception that private military and security companies operate in a legal vacuum by recalling, compiling, and reminding the reader of the applicable international legal obligations. The Montreux Document enhances the protection afforded to people affected by armed conflicts by clarifying and reaffirming international law, by encouraging the adoption of national regulations on PMSCs designed to strengthen respect for international law, and by offering guidance on how and in what light this should be done, based on lessons learnt.

The Montreux Document is intended to have a practical bearing on the interaction between states and PMSCs. The Montreux Document describes good practices in implementing existing international legal obligations. These good practices are designed to help governments to establish effective oversight and control over PMSCs. The good practices cover a number of practical areas, including: authorisation systems, contract provisions, and licensing requirements, as well as suggesting a number of effective methods for states to oversee the PMSCs they come into contact with.

All states and international organisations are invited to communicate their support for the document to the Swiss Federal Department of Foreign Affairs, as set out in the preface to the Montreux Document. In doing so, they do not commit themselves to new legal obligations. They declare their political support for the Montreux Document’s main thrust: that international legal obligations have a bearing on PMSCs and must be complied with.

As support for the Montreux Document is continuously growing, the focus is now turning to its dissemination and practical implementation. Since its adoption, the Montreux Document has served as a basis for the International Code of Conduct for Private Security Service Providers which binds member companies.

What the Montreux Document is

The Montreux Document is an intergovernmental document intended to promote respect for international humanitarian law and human rights law, especially when PMSCs are present in armed conflicts. It is not legally binding as such. However, the rules it contains are well-established in international law and are binding to states by virtue of international treaties or international customary law.

The Montreux Document is the result of an international process launched by the Government of Switzerland and the ICRC. It was finalized by consensus on 17 September 2008 by 17 states: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine and the United States of America. The number of participating states is growing steadily.

For up-to-date information on participation, see www.eda.admin.ch/psc

When the Montreux Document applies

The Montreux Document, in line with international humanitarian law, was written bearing in mind that PMSCs operate in an armed conflict environment. However, it is also meant to provide practical guidance in other contexts (see paragraph 5 of its preface). It also contains statements on pertinent international human rights law and international criminal law which are applicable at all times. Furthermore, most of the good practices identified, including those derived from international humanitarian law, are ideally put into place during peacetime. The Montreux Document and its good practices provide useful guidance to set meaningful regulatory standards for, and to support effective oversight over a rapidly expanding industry in any situation and thus helps to prevent actions or misconduct that may contribute to violations of national and international laws.

What the Montreux Document does

The Montreux Document ...

- recalls the pertinent international legal obligations of states, PMSCs and their personnel in situations of armed conflict;
- contains a compilation of good practices designed to help states take national measures to implement their obligations;
- highlights the responsibilities of three types of states: Contracting states (countries that hire PMSCs), Territorial states (countries on whose territory PMSCs operate) and Home states (countries in which PMSCs are based);

- makes it clear that states have an obligation to ensure respect for international humanitarian law and to uphold human rights law; as a result, they have a duty to take measures designed to prevent misconduct by PMSCs and ensure accountability for criminal behaviour;
- recalls that PMSCs and their personnel are bound by international humanitarian law and must respect its provisions at all times during armed conflict, regardless of their status;
- recalls that misconduct on the part of PMSCs and their personnel can trigger responsibility on two levels: first, the criminal responsibility of the perpetrators and their superiors, and second, the responsibility of the state that gave instructions for, directed or controlled the misconduct;
- provides a toolkit for governments to establish effective oversight and control over PMSCs, for example through contracts or licensing/authorisation systems.

Why the Montreux Document is useful

The Montreux Document is useful because it enhances the protection afforded to people affected by armed conflicts but also by post-conflict and by other comparable situations. It does so by clarifying and reaffirming international law, by encouraging the adoption of national regulations on PMSCs designed to strengthen respect for international law, and by offering guidance on how and in what light this should be done, based on lessons learnt.

Questions and answers on the Montreux Document

Why are PMSCs a source of humanitarian concern?

The humanitarian need to address the phenomenon of PMSCs stems from their presence and role in today's armed conflicts. Inasmuch as they are armed and mandated to carry out activities that bring them close to actual combat, they potentially pose an additional risk to the local population and are themselves at risk of being attacked. So far, PMSCs have been largely left without oversight by states and no specific international regulations are in place for them. International humanitarian law is applicable to them, but there was a clear need to spell out the rules for PMSCs and offer practical advice on how to deal with them. The Montreux Document is designed to meet that need.

What is the difference between private military and private security companies?

There is no standard definition of what is a "military" company and what is a "security" company. In ordinary parlance, certain activities (such as participating in combat) are traditionally understood to be military in nature and others (such

as guarding residences) related to security. In reality many companies provide a wide range of services, which can go from typically military services to typically security services. They are therefore not easily categorized. Moreover, from the humanitarian point of view, the relevant question is not how a company is labelled but what specific services it provides in a particular instance. For this reason, the Montreux Document avoids any strict delimitation between private military and private security companies and uses the inclusive term “private military and security companies” (PMSCs) to encompass all companies that provide either military or security services or both.

Does any international treaty mention the rights and obligations of PMSCs directly?

No international humanitarian law or human rights treaty mentions PMSCs specifically. The Montreux Document compiles those rules of international law that are most pertinent to PMSC operations, for easy reference.

Do PMSCs operate in a legal vacuum?

No. It is true that states often discover that they lack the necessary domestic legislation to deal with PMSCs. It is also true that international law on mercenaries is largely inapplicable to the relatively new phenomenon of PMSCs (see below). However, in situations of armed conflict certain well-established rules and principles do clearly apply, namely under international humanitarian law, which regulates both the activities of PMSC staff and the responsibilities of the states that hire them. Also, human rights law imposes a number of obligations on states to protect persons against misconduct on the part of PMSCs. The Montreux Document explains these rules and principles.

When does the Montreux Document apply?

The Montreux Document, in line with international humanitarian law, was written bearing in mind that PMSCs operate in an armed conflict environment. However, it is also meant to provide practical guidance in other contexts (see paragraph 5 of its preface). A current example is the contracting of PMSCs to protect merchant shipping against acts of piracy. Even if fighting piracy is best understood as a matter of law enforcement (and not of armed conflict), the Montreux Document’s statements on jurisdiction remain pertinent reading.

What rules apply to states with regard to PMSCs?

States that contract PMSCs can, under certain conditions, be held accountable for violations committed by PMSC employees, in particular if the PMSC exercises

elements of governmental authority or if it acts under the instructions or control of the State authorities. In such cases, the same rules apply to the state – i.e. not to violate international humanitarian law and human rights law – as if it had acted itself through its own military forces.

States also have obligations to uphold the law: they must ensure respect for international humanitarian law and, to the extent that it applies in armed conflicts, human rights law. Hence states must take appropriate measures to ensure that no PMSC violates international humanitarian law or engages in misconduct that affects the human rights of potential victims. This can include taking measures to ensure that PMSCs vet their personnel and provide adequate training for them. States also have an obligation to prosecute war crimes and certain serious violations of human rights law.

What rules apply to PMSCs and their personnel?

All individuals have to respect international humanitarian law in any activity related to an armed conflict. PMSC personnel are no exception. If they commit serious violations of humanitarian law, such as attacks against civilians or ill-treatment of detainees, these are war crimes that must be prosecuted by states. While companies as such have no obligations under international law, their employees do.

On the other hand, international humanitarian law and human rights law also protect the personnel of these companies. The protection they are entitled to will vary depending on the type of activity they engage in. For instance, most PMSC employees are deployed as civilians in situations of armed conflict; in this case, they are protected against attack, unless and for such time as they directly participate in hostilities.

Is an armed PMSC employee considered to be a civilian who therefore enjoys the protection all civilians are granted under the Geneva Conventions?

In most cases, yes, but there are cases where they cannot be considered civilians. The status of PMSC personnel depends on their exact employment and functions. Most are not employed to fight, but rather to provide support functions (equipment maintenance, logistic services, guarding diplomatic missions or other civilian sites, catering, etc.). In these cases they are considered to be civilians. This means they are protected against attack unless and for such time as they directly participate in hostilities. But it also means that if they take a direct part in hostilities, they can be prosecuted if domestic law criminalises such conduct.

In rarer cases, PMSC employees are incorporated into the armed forces of a State or form groups or units under a command responsible to a party to an armed conflict. In such situations, they do not enjoy protection as civilians.

Are PMSC employees mercenaries?

Mercenaries are defined in international humanitarian law. Article 47 of Protocol I additional to the 1949 Geneva Conventions, applicable in international armed conflicts, describes a mercenary as someone who: (1) is especially recruited in order to fight in an armed conflict; (2) in fact takes a direct part in hostilities; (3) is motivated essentially by the desire of private gain; (4) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (5) is not a member of the armed forces of a party to the conflict; (6) has not been sent by a State which is not a party to the armed conflict on official duty as a member of its armed forces.

That definition excludes most PMSC personnel, most of whom are not contracted to fight in military operations. Many are nationals of one of the parties to the conflict. Moreover, it is difficult to prove the motivation of private gain; presumably, not all of them are thus motivated. Lastly, while some private contractors are reportedly very highly paid, it would be very difficult to verify if they receive a substantially higher wage than soldiers.

This being said, PMSC employees do sometimes meet the conditions for definition as mercenaries. If that is the case, they are not entitled to combatant or prisoner-of-war status in an international armed conflict.

Who has the authority to prosecute suspected war criminals?

The state in which a contractor is deployed will usually have authority (jurisdiction), because the crime was committed on its territory. However, PMSC employees may have immunity under a bilateral agreement, such as a status-of-forces agreement; such agreements usually cover the armed forces of one state that are present in another state, but are sometimes extended to civilians accompanying the armed forces and to PMSCs. Also, states experiencing armed conflict do not always have the practical capacity to prosecute crimes if judicial systems are weakened.

Other states can also exercise jurisdiction if one of their nationals commits a crime abroad. However, states have not always established jurisdiction under domestic law for such cases. And, even if they have established jurisdiction, the fact that the crime was committed abroad in a situation of armed conflict can pose serious practical obstacles to criminal investigations, for instance when it comes to gathering evidence.

The combination of lack of jurisdiction and of practical obstacles can lead to impunity for the perpetrators. The Montreux Document makes some practical recommendations to avoid such an outcome. For example, it recommends that jurisdictional gaps be actively avoided when agreements are concluded between States.

How does the Montreux Document enhance the protection of civilians in armed conflict?

The Montreux Document raises awareness of the humanitarian concerns at play whenever PMSCs operate in an armed conflict environment. It reminds states of their obligations and offers them guidance on how PMSCs should sensibly be dealt with. Preventing violations and holding PMSCs accountable if they commit violations are at the core of the Montreux Document. But at the end of the day, the question is one of implementation. It is up to PMSCs and states alike to see to it that the protection of civilians is put into practice.

Does the Montreux Document legitimize the activities of PMSCs?

No. States disagree about the legitimacy of PMSCs and their activities, but PMSCs are present in conflicts and will likely remain so. For the Swiss Government and the ICRC, it was therefore important to tackle the issue and to recall international legal obligations without rejecting or welcoming the use of PMSCs. Like all other armed actors present on the battlefield, PMSCs are governed by international rules, whether their presence and activities are legitimate or not. The Montreux Document follows this humanitarian approach. It does not take a stance on the question of PMSC legitimacy. It does not encourage the use of PMSCs nor does it constitute a bar for states who want to outlaw PMSCs.

How did the Montreux Document come about?

The Montreux Document is the fruit of a joint initiative by the Swiss Government and the ICRC on the subject of PMSCs. It sprang from a desire to bring together the governments most affected by PMSCs in order to discuss the international legal framework that governs their activities. It also sought to draw up practical measures (good practices) that states could take to promote respect for international humanitarian law and human rights law by PMSCs.

Seventeen governments have been involved in the development of the document: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the Ukraine and the United States of America. It is these states that helped draft the document. While the process was for governments, it has

benefited since the beginning from the valuable input of industry representatives, academic experts and NGOs. In addition to the governmental meetings, the Initiative held four expert meetings with high-level experts from all sectors in order to obtain the most detailed legal provisions and practical recommendations, based on concrete experience and lessons learnt.

Why were only 17 states involved in developing the Montreux Document?

PMSCs are not present in all countries to the same extent. The Swiss Initiative aimed to be practical and benefit from the input of those states most affected by the phenomenon or which had experience in dealing with it.

The Initiative also sees itself as a first step towards providing greater clarity and practical advice. The process was therefore meant to be light and produce a result in a reasonable time, considering that there was no existing instrument that compiled all the pertinent legal obligations relevant to PMSCs.

Can others be part of the Montreux Document?

Yes. Other states and international organisations are invited to communicate their support for the document to the Swiss Federal Department of Foreign Affairs, as set out in the preface to the Montreux Document. In doing so, they do not commit themselves to new legal obligations. They declare their political support for the Montreux Document's main thrust: that international legal obligations have a bearing on PMSCs and must be complied with.

Why is the Montreux Document not an international treaty?

The Swiss Government and the ICRC felt it important to produce a meaningful and practical instrument in a relatively short period of time. An international treaty would have taken many years to negotiate. Also, considering the very divisive nature of the issue and the strong political positions involved, a humanitarian, apolitical approach was more likely to have tangible and practical results.

Annex IV

List of Participants to the Montreux Document (August 2016)

States (Total: 54)

African Region: (5)

STATE	PARTICIPANT SINCE
Angola	17 September 2008
Madagascar	9 November 2015
Sierra Leone	17 September 2008
South Africa	17 September 2008
Uganda	23 July 2009

Asia Pacific Region: (8)

STATE	PARTICIPANT SINCE
Afghanistan	17 September 2008
China	17 September 2008
Cyprus	29 September 2009
Iraq	17 September 2008
Japan	6 February 2014
Jordan	18 May 2009
Kuwait	2 May 2013
Qatar	30 April 2009

Eastern Europe Region: (12)

STATE	PARTICIPANT SINCE
Albania	17 February 2009
Bosnia and Herzegovina	9 March 2009
Bulgaria	8 January 2013
Croatia	22 May 2013
Czech Republic	14 November 2013
Former Yugoslav Republic of Macedonia	3 February 2009

ANNEX IV. LIST OF PARTICIPANTS TO THE MONTREUX DOCUMENT

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Georgia	22 October 2009
Hungary	1 February 2011
Lithuania	13 June 2012
Poland	17 September 2008
Slovenia	24 July 2012
Ukraine	17 September 2008

Latin American and Caribbean Region: (4)

STATE	PARTICIPANT SINCE
Chile	6 April 2009
Costa Rica	25 October 2011
Ecuador	12 February 2009
Uruguay	22 April 2009

Western Europe and Others Region: (25)

STATE	PARTICIPANT SINCE
Australia	17 September 2008
Austria	17 September 2008
Belgium	28 February 2012
Canada	17 September 2008
Denmark	9 August 2010
Estonia	6 July 2016
Finland	25 November 2011
France	17 September 2008
Germany	17 September 2008
Greece	13 March 2009
Iceland	22 October 2012
Ireland	17 November 2014
Italy	15 June 2009
Liechtenstein	27 April 2009
Luxembourg	27 November 2013
Monaco	9 April 2015
Netherlands	20 February 2009
New Zealand	14 October 2013
Norway	8 June 2012
Portugal	27 March 2009
Spain	20 May 2009

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Switzerland	17 September 2008
Sweden	17 September 2008
United Kingdom	17 September 2008
United States of America	17 September 2008

International Organisations (Total: 3)

European Union	27 August 2012
North Atlantic Treaty Organisation	21 November 2013
Organisation for Security and Co-operation in Europe	6 December 2013

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Annex V

Agenda of the Ethiopia Regional Conference

11 November 2015

9:00	Registration
9:30	<p>Official opening ceremony</p> <p><i>Master of Ceremonies:</i> Prof. Amr ABDALLA, Ph.D. Senior Advisor on Policy Analysis and Research, Institute for Peace and Security Studies (IPSS), Ethiopia</p> <ul style="list-style-type: none">• Ms. Anne-Béatrice BULLINGER, Deputy Head of Mission, Embassy of Switzerland to Ethiopia• Ms. Mutsa MANGEZI, ICRC Deputy Head of Delegation to the African Union• Dr. Yonas ADAYE ADETO, Academic Director, IPSS, Ethiopia• Ms. Alice MCGRATH-CRÉGUT, Programme Manager, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Switzerland
10:00	<p>Key note address: Dr. Tarek SHARIF, Head of Defense and Security Division, AU Commission for Peace and Security</p>
10:20	<p><i>Group photo and welcome coffee</i></p>
11:00	<p>Panel 1: Introduction to the challenges of PMSCs in Africa</p> <p><i>Moderator:</i> Dr. Sabelo GUMEDZE, Head/ Senior Research and Development Unit, Private Security Industry Regulatory Authority, South Africa</p> <p>Panellists:</p> <ul style="list-style-type: none">• Presentation of background papers: Dr. Laurence JUMA, Professor and Deputy Dean, Faculty of Law, Rhodes University, South Africa and Dr. Tessa DIPHOORN, Post-doctoral researcher, University of Amsterdam, Netherlands
12:00	<p>Interactive discussion</p> <p><i>Moderator:</i> Dr. Sabelo GUMEDZE, Head/ Senior Research and Development Unit, Private Security Industry Regulatory Authority, South Africa</p>
12:30	<p><i>Lunch</i></p>
13:30	<p>Panel 2: Introduction to the Montreux Document</p> <p><i>Moderator:</i> Dr. Laurence JUMA, Professor and Deputy Dean, Faculty of Law, Rhodes University, South Africa</p> <p>Presentations:</p> <ul style="list-style-type: none">• Mr. Jonathan CUÉNOUD, Department of International Law, Federal Department of Foreign Affairs, Switzerland• Ms. Marie-Louise TOUGAS, ICRC Regional Legal Adviser• Ms. Anna Marie BURDZY, Project Officer, DCAF, Geneva

14:15	<p>The Montreux Document: Questions – Responses – Contributions <i>Moderator:</i> Dr. Laurence JUMA, Professor and Deputy Dean, Faculty of Law, Rhodes University, South Africa</p>
14:45	<i>Coffee</i>
15:15	<p>Panel 3: Perspectives and experiences on a national level: challenges and opportunities for the regulation of PMSCs <i>Moderator:</i> Dr. Yonas ADAYE ADETO, Academic Director, IPSS, Ethiopia Panellists:</p> <ul style="list-style-type: none"> • Dr. Sabelo GUMEDZE, Head/ Senior Research and Development Unit, Private Security Industry Regulatory Authority, South Africa • Mr. Solomon HASSEN, IPSS, Addis Ababa University, Ethiopia • Lt. Col. Dr. Dan KUWALI, Chairperson, Malawi National Committee on International Humanitarian Law
16:15	<p>Interactive discussion <i>Moderator:</i> Dr. Yonas ADAYE ADETO, Academic Director, IPSS, Ethiopia</p>
16:45	Closure of the day
17:00–19:30	Reception hosted by Embassy of Switzerland

12 November 2015

9:00	<p>Summary of Day 1 <i>Master of Ceremonies:</i> Prof. Amr ABDALLA, Ph.D. Senior Advisor on Policy Analysis and Research, Institute for Peace and Security Studies (IPSS), Ethiopia</p>
9:15	<p>Panel 4: Perspectives and experiences on a regional level: challenges and opportunities for the regulation of PMSCs <i>Moderator:</i> Dr. Mehari Taddele MARU, International consultant, Ethiopia Panellists:</p> <ul style="list-style-type: none"> • Dr. Norman MLAMBO, SSR Focal Point, Defense and Security Division, African Union • Ms. Margaret GICHANGA, Researcher, Private Security Regulatory Authority, South Africa • Mr. Okey UZOECHINA, Regional Expert, Security Sector Reform and Governance, Nigeria
10:00	<p>Interactive discussion <i>Moderator:</i> Dr. Mehari Taddele MARU, International consultant, Ethiopia</p>
10:30	<i>Coffee</i>
11:00	<p>Panel 5: The use of PMSCs in extractive industries: the Voluntary Principles on Security and Human Rights and interaction with the Montreux Document <i>Moderator:</i> Mr. Jonathan CUENOUD, Department of International Law, Federal Department of Foreign Affairs, Switzerland Panellists:</p> <ul style="list-style-type: none"> • Mr. Rémy FRIEDMANN, Division of Human Security, Federal Department of Foreign Affairs Switzerland

	<ul style="list-style-type: none"> • Mr. Joseph KIBUGU, Eastern Africa Researcher & Representative, Business and Human Rights Resource Centre, Kenya • Ms. Rose KIMOTHO, Programme Manager – East Africa, Institute for Human Rights and Business (IHRB), Kenya
12:00	<p>Interactive discussion</p> <p><i>Moderator:</i> Mr. Jonathan CUENOUD, Department of International Law, Federal Department of Foreign Affairs, Switzerland</p>
12:30	<i>Lunch</i>
13:30	<p>Panel 6: Continental and international perspectives: The African Union and the work of the United Nations</p> <p><i>Moderator:</i> Dr. Charles UKEJE, Education and Training Lead, IPSS, Ethiopia</p> <p>Panellists:</p> <ul style="list-style-type: none"> • Mr. Olabisi DARE, Department of Political Affairs, African Union Commission • Mr. Saeed MOKBIL, UN Working Group on the use of mercenaries, Geneva • Dr. Mehari Taddele MARU, International consultant, Ethiopia
14:15	<p>Interactive discussion</p> <p><i>Moderator:</i> Dr. Charles UKEJE, Education and Training Lead, IPSS, Ethiopia</p>
14:45	<p>Presentation on the International Code of Conduct on Private Security Providers Association</p> <ul style="list-style-type: none"> • Mr. Rémy FRIEDMANN, Division of Human Security, Federal Department of Foreign Affairs Switzerland
15:00	Interactive discussion
15:30	<i>Coffee</i>
16:00	<p>Conference Conclusions and Looking Forward:</p> <p><i>Open floor roundtable discussion led by:</i></p> <ul style="list-style-type: none"> • Ms. Mutsa MANGEZI, ICRC Deputy Head of Delegation to the African Union
16:45	<p>Closing ceremony</p> <ul style="list-style-type: none"> • Ms. Anne-Béatrice BULLINGER, Deputy Head of Mission, Embassy of Switzerland to Ethiopia • Mr. James REYNOLDS, ICRC Head of Delegation, Ethiopia • Dr. Yonas ADAYE ADETO, Academic Director, IPSS, Ethiopia • Ms. Alice MCGRATH-CRÉGUT, Programme Manager, DCAF, Geneva
17:15	Closure of Conference

Annex VI

Key note Address by Dr. Tarek A. Sharif **Head, Defense and Security Division, African Union Commission**

Master of Ceremonies;

Your Excellency Ms. Anne Beatrice Bullinger, Deputy Head of Mission, Embassy of Switzerland to Ethiopia;

Ms. Mutsa Mangezi, Deputy Head of Delegation of the International Committee of the Red Cross (ICRC) to the African Union;

Ms. Alice McGrath-Cregut, the Program Manager of the Geneva Centre for the Democratic Control of Armed Forces (DCAF) Switzerland;

Dr. Yonas Adaye Adeto, Academic Director, Institute for Peace and Security Studies of the University of Addis Ababa, Ethiopia;

Colleagues from regional and international organisations, development and civil society partners;

Distinguished delegates and representatives of national institutions; Ladies and gentlemen:

It gives me great pleasure to welcome all of you to this important, regional conference on Private Military and Security Companies (PMSCs). I feel very honoured to be invited to speak at this important workshop, and to represent the African Union Commission. At the outset, let me start by thanking all the partners for co-organising and co-hosting this essential event here in Addis Ababa, Ethiopia.

In particular, I wish to commend Switzerland and the ICRC for their continued commitment and raising awareness on the need to regulate the use of PMSCs. I would also like to recognise the efforts made by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) and the Institute for Peace and Security Studies (IPSS) of the University of Addis Ababa for convening such a range of stakeholders for this event.

Ladies and Gentlemen,

PMSCs often include companies offering services that involve the potential to exercise force in a systematic manner and by military or paramilitary means. These companies often fall outside the direct control of the state in terms of their financing and functioning and recruit employees from many countries to undertake activities

in various parts of the world. As colleagues and partners present here are all well aware, the issue of the use of PMSCs has been debated in many post-colonial African countries, especially in countries where complex conflict situations become favourable to the privatisation of security.

The transfer to private companies of certain public security functions, that are traditionally the sole responsibility of states, has significantly changed the actors in the security field and increased the role of PMSCs. Specific patterns on the African continent in this respect include the presence of a vast demand for professional fighters, a fragile or vacuum of state Authority, the involvement of private companies in security sector reform (SSR) related training activities, and the downsizing of militaries leading to a reserve of discharged military personnel. The number of PMSCs contracted by African states has only increased over the past decades, leading to legitimate concerns about the sovereignty of states, the accountability of security institutions, and the respect for human rights and international humanitarian law.

It has been observed that PMSCs in Africa are used for a multitude of purposes relating to passive or defensive security, such as protection of VIPs, the training of national militaries or other services concerning military operations, protection of critical areas, private guarding of persons or property, arms procurement, surveillance and investigative services. PMSCs have also been used in logistic and medical support and humanitarian action in conflict situations. These activities have put PMSCs very close to conflict situations as (non-state) security providers in armed conflict and post-conflict contexts. PMSCs also move large quantities of weapons and military equipment and could potentially undermine the established law and order if they remain unregulated and unmonitored. In this regard, PMSCs may pose a risk to the independence, sovereignty, and territorial integrity of AU Member States, and to the social and economic development of civilian populations.

Ladies and Gentlemen,

Let me also point out that the earlier discussions about PMSCs in the 1950s and 1960s was associated with mercenary activities. It is against this background that, in July 1977, in response to the grave threat posed by mercenaries, the OAU Heads of State adopted an instrument on the Convention for the Elimination of Mercenaries in Africa, which entered into force in 1985, and paved the way for the criminalisation of the use of mercenaries.

The AU approach to mercenaries and PMSCs is also highlighted in the AU Policy Framework on SSR that provides the AU Member States, RECs and other stakeholders and partners with the necessary guidelines to implement SSR programmes. The AU Policy Framework on SSR discourages the use of private military companies in SSR activities in Africa either by AU Member States, RECs or their international partners.

Furthermore, it urges the AU Member States, RECs or their international partners to conform to international, regional and national frameworks regulating the activities of private security companies, when contracting the services of such companies.

The AU also highlights the need for the AU Member States to develop national frameworks that set clear rules for the activities of PMSCs. I am glad to note that some African countries have already started to regulate the use of arms by PMSCs and their interaction with other state institutions within their borders. Ladies and Gentlemen,

I trust that this conference will allow you to engage in an open dialogue and productive discussions that will lead to a common perspective on the interactions with PMSCs in Africa.

Let me conclude with expressing my sincere gratitude to the Ethiopian Government, and in particular to the Ministry of Foreign Affairs of Ethiopia for hosting this conference. Finally, I wish to express my appreciation again to the participating delegations, experts, and national institutions for attending this regional conference.

The African Union Commission is unconditionally committed to the respect for the national sovereignty of Member States, national, regional and continental security, human rights and international humanitarian law. The AU remains grateful to the Swiss Government, ICRC and DCAF for playing a key role in the international efforts to regulate the activities of PMSCs and hope that this will lead to improved peace, security and prosperity to the states and people on the African continent.

I thank you all for your kind attention and wish you fruitful and successful deliberations.

Annex VII

List of Conference Participants

Co-Hosts and Organisers of the Regional Conference:

1. Ms. Anne-Béatrice Bullinger, Deputy Head of Mission, Embassy of Switzerland to Ethiopia
2. Dr. Yonas Adaye Adeto, Academic Director, IPSS, Ethiopia
3. Professor Amr Abdalla, Senior Advisor on Policy Analysis and Research, IPSS, Ethiopia
4. Mr. James Reynolds, ICRC Head of Delegation, Ethiopia
5. Ms. Alice McGrath-Crégut Programme Manager, DCAF, Geneva

High Level Representatives (in alphabetical order):

6. H.E. Albert Ranganai Chimbindi, Permanent Representative of Zimbabwe to Ethiopia, the African Union, and the UN ECA
7. H. E. Ambassador Chimango E. Chirwa, Permanent Representative of Malawi to Ethiopia and the African Union and the UN ECA
8. H.E. Ambassador Araya Desta, Permanent Representative of Eritrea to Ethiopia and the African Union and the UN ECA
9. Colonel Abdourahmane Dieng, Head Regional Security Division, ECOWAS Commission, Nigeria
10. H.E. Ambassador Tewolde Gebremeskel, Director of Peace and Security Division, IGAD
11. H.E. Ambassador Osman Hammad, Permanent Representative of the Republic of Sudan to Ethiopia and the African Union and the UN ECA
12. Professor Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions and (Co) Director: Institute for International and Comparative Law in Africa
13. H. E. Ambassador Akuei Bona Malwal, Permanent Representative of the Republic of South Sudan to Ethiopia, the African Union, and the UN ECA
14. Ms. Mutsa Mangezi, ICRC Deputy Head of Delegation to the African Union, Ethiopia
15. Dr. Norman Mlambo, SSR Unit Focal Point, African Union Peace and Security Department
16. Dr. Tarek Sharif, Head of Defence and Security Division, African Union Peace and Security Department

Regional Experts and Contributors (in alphabetical order):

17. Ms. Anna Marie Burdzy, Project Officer, DCAF, Geneva
18. Mr. Jonathan Cuénoud, Department of International Law, Federal Department of Foreign Affairs, Switzerland
19. Mr. Olabisi Dare, Department of Political Affairs, African Union Commission
20. Dr. Tessa Diphoorn, Post Doctoral Researcher, University of Amsterdam, the Netherlands
21. Mr. Rémy Friedmann, Division of Human Security, Federal Department of Foreign Affairs, Switzerland
22. Ms. Margaret Gichanga, Researcher, Private Security Industry Regulatory Authority (PSIRA), South Africa
23. Dr. Sabelo Gumede, Senior Researcher, Private Security Industry Regulatory Authority (PSIRA), South Africa
24. Mr. Solomon Hassen, Academic Coordinator, IPSS, Ethiopia
25. Dr. Mehari Taddele Maru, International Consultant, Ethiopia
26. Mr. Saeed Mokbil, Expert Member, UN Working Group on the Use of Mercenaries, Geneva
27. Professor Laurence Juma, Deputy Dean, Faculty of Law, Rhodes University, South Africa
28. Mr. Joseph Kibugu, Eastern Africa Researcher and Representative, Business and Human Rights Resource Centre, Kenya
29. Ms. Rose Kimotho, Programme Manager for East Africa, Institute for Human Rights and Business (IHRB), Kenya
30. Lt. Col. Dr. Dan Kuwali, Chairperson, Malawi National Committee on International Humanitarian Law, Malawi
31. Dr. Marie-Louise Tougas, Legal Adviser, International Committee of the Red Cross (ICRC)
32. Ms. Yohamin Teshome, ICRC Delegation to the African Union, Ethiopia
33. Dr. Charles Ukeje, Education and Training Lead, IPSS, Ethiopia
34. Mr. Okey Uzochina, Regional Expert, Security Sector Reform, Nigeria

Participants (in alphabetical order):

35. Dr. Robert Afriyie, Deputy Head of Mission, Embassy of the Republic of Permanent Mission of Ghana
36. Col. Dessalegn Asfaw, Ethiopia Peace Support Training Centre
37. Mr. Habibu Yaya Bappah, IPSS, Kings University Fellow, Ethiopia
38. Brig. Gen. John B. Bishoge, Defence Attaché, Embassy of the United Republic of Tanzania
39. Mr. Yohannes Bouyalev, IPSS Academic Staff, Ethiopia
40. Mr. Matthew Brubacher, DDR Officer, UN Office to the African Union

ANNEX VII. LIST OF CONFERENCE PARTICIPANTS

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41. Mr. Moges Chekole, Federal Police Commission of Ethiopia
42. Col. Jacques Deman, Delegation of the European Union to the African Union, Peace & Security section
43. Ethiopia National Intelligence Service
44. Ethiopia Defense and Security Affairs Standing Committee
45. Ethiopia House of Peoples Representatives
46. Mr. Solomon Fantahun, Addis Ababa Police Commission
47. Mr. Lubega Farouq, Senior State Attorney, Solicitor General, Embassy of the Republic of Uganda to Ethiopia, Djibouti, Permanent Mission to AU, UN-ECA, IGAD
48. Commander Muluwork Gebre, Ethiopia Federal Police Commission
49. Mr. Cephas Gurira, Defence Advisor, Permanent Mission of Zimbabwe
50. Ms. Esther Ikubaje, IPSS Program Officer, Ethiopia
51. Mr. Yesuf Jemaw, Director of International Cooperation on Legal Affairs Directorate, Ministry of Justice, Federal Democratic Republic of Ethiopia
52. Mr. Dawit Yohannes, Special Projects Coordinator, IPSS, Ethiopia
53. Mr. Girma Ketsela, Ethiopia Federal Police Commission
54. Dr. JJ Klaas, First Secretary, Political Affairs, South African Embassy, Ethiopia
55. Ms. Anicia Lala, SSR Adviser, ISSAT-DCAF, Geneva
56. Mr. Hallelulja Lulie, Instititue for Security Studies, Ethiopia
57. Mr. Saston Mapfaka Machigere, Ministor Counselor, Peace and Security, Zimbabwe Embassy
58. Col. Daniel Manyothwane, Embassy of Botswana
59. Colonel Julius M. Minyori, Defence Liaison Officer, Embassy of the Republic of Kenya
60. Mr. Isaac Aloyce Mlawa, Military Officer, Tanzania People's Defence Forces
61. Col. Vincent Moyo, Malawi Embassy
62. Mr. Fasil Mulatu, Addis Ababa, Center for Human Rights, Ethiopia
63. Dr. Sunday Angoma Okello, Assistant Professor, IPSS Ethiopia
64. Permanent Mission of Sierra Leone
65. Permanent Mission of Uganda
66. Permanent Mission of Zambia
67. Mr. Ndore Rurinda, Embassy of Rwanda, Ethiopia
68. Mr. Edalkachew Sebehatu, Sebehatu and His Sons Private Security Company, Ethiopia
69. Ms. Safa Mohammed Sekainy, Counselor, Embassy of the Republic of Sudan
70. Mr. Dereje Seyoum, IPSS, Research Officer, Ethiopia
71. Mr. Yonas Tariku, IPSS Research Officer, Ethiopia
72. Aranshi G. Teklu, Agar Private Security Company, Ethiopia
73. Colonel Cheikh A.T. Thioune, Embassy of Senegal, Ethiopia

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- 74. Mr. Abera Tsegaye, Ethiopia Civil Service University College
- 75. Ms. Tigist Yeshiwas, IPSS Academic Staff, Ethiopia

Rapporteurs and Communications Support:

- 76. Mr. Alem Asmelash, Communications Assistant, IPSS Ethiopia
- 77. Ms. Pomi Ayalew, Communications Assistant, IPSS Ethiopia
- 78. Ms. Elshaddai Mesfin Haileyesus, Rapporteur, IPSS Ethiopia
- 79. Mr. Elshadai Nedash, Communications Manager, IPSS Ethiopia
- 80. Mr. Seid Negash, IT Support, IPSS Ethiopia
- 81. Ms. Zeynya Shikur, Rapporteur, IPSS Ethiopia

Press and Media:

- 82. Meseret Mamo, Press TV
- 83. Mr. Elias Meseret, Associated Press
- 84. Mr. Paul Schem, Associated Press
- 85. Eudes Sskyondwa, Press TV
- 86. Mr. Kalkidan Yibeltal, Addis Standard

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Report of the Ethiopia Regional Conference on Private Military and Security Companies

On 11–12 November 2015, the Swiss Federal Department of Foreign Affairs (FDFA), the International Committee of the Red Cross (ICRC), the Institute for Peace and Security Studies (IPSS – Addis Ababa University) and the Geneva Centre for the Democratic Control of Armed Forces (DCAF) organised a Regional Conference on private military and security companies (PMSCs) in Addis Ababa, Ethiopia. The event gathered over 80 participants from the region including representatives of 16 states, as well as international and regional organisations, civil society, industry and other experts on PMSCs and the *Montreux Document on pertinent international legal obligations and Good Practices for States related to operations of PMSCs in armed conflict*.

The Regional Conference provided an opportunity for participants to:

- Facilitate dialogue and debate among states with respect to regulation and oversight of the PMSC industry, both at the national and regional levels;
- Identify good practices and cooperation at the national, regional and international levels on issues related to the regulation and oversight of PMSCs;
- Raise awareness on the Montreux Document and its rules and Good Practices and discuss its relevance for African states within and beyond the African context;
- This report aims to provide a summary of the presentations and discussions held during the Regional Conference and proposes ways forward for the effective implementation of PMSC regulation.